No. 344. 1896.

Brief of Gresham for Petitioners

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Filed Nov. 22, 1897.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

HARRY W. DICKERMAN, TRUSTEE, ET AL.,
Petitioners,

v.

THE NORTHERN TRUST COMPANY AND OVID B. JAMESON, TRUSTEES, AND COLUMBIA STRAW PAPER COMPANY,
Respondents.

Petition of Harry W. Dickerman, Trustee for the Second National Bank of Rockford, Illinois, Fred J. Diem, E. P. Hooker, Trustee for Merchants' National Bank of Defiance, Ohio, and in his own behalf and James C. Richardson, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

OTTO GRESHAM,
Solicitor and of Counsel for Petitioners.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

HARRY W. DICKERMAN, TRUSTEE, ET AL.,
Petitioners.

Petition for Writ of Certiorari requiring the Circuit Court of Appeals of the Seventh Circuit to certify to the Supreme Court for its review and determination a case of Harry W. Dickerman *et al.*, Petitioners, *v.* The Northern Trust Company and Ovid B. Jameson, Trustees, and Columbia Straw Paper Company, Respondents.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Harry W. Dickerman, Trustee for the Second National Bank of Rockford, Illinois, Fred J. Diem, E. P. Hooker, Trustee for Merchants' National Bank of Defiance, Ohio, and in his own behalf, and James C. Richardson, respectfully show to this honorable court:

That the questions involved in the above cause are

questions of gravity and importance and for that reason the power of this honorable court can be properly invoked to require said cause to be certified. (*Ex parte Lau Ow Bew, Petitioner*, 141 U. S. 583.)

In this case, a decree for the foreclosure of a mortgage for $1,000,000 principal and $165,049 interest, and for the sale of the mortgaged premises, was entered by the Circuit Court and affirmed by the Circuit Court of Appeals, without any of the bonds representing such mortgage-debt, or any of the interest warrants representing such interest, having been produced before the Master or Court, or their absence accounted for, and without any stipulation or admission being contained in the mortgage or bonds or pleadings which would render such evidence unnecessary.

At a time when none of the bonds were due, either by their own terms or by the provisions of the mortgage, the trustees declared all of them due on the sole ground that a judgment before a justice of the peace for less than $200 had been taken against the mortgagor-corporation, and an execution immediately issued thereon, although the judgment was entered by arrangement between the officers of the mortgagor-corporation and the representatives of the trustees and bondholders, and although judgment was entered and execution sworn out after business hours on the very evening on which, a short time later, the whole million dollars of bonds was declared immediately due and payable.

The principal controversy arose over the defense, made by petitioners as stockholders of the mortgagor-company (allowed by the court to come in and defend against the foreclosure), wherein it was claimed by

petitioners that they and defendant company had been wronged by the bondholders, in this, that the former, as owners of various paper-mills, having sold the same and received part of the purchase-price in capital stock of a new corporation, organized by the bondholders, the latter had issued to themselves several million dollars of like capital stock of the new corporation, without paying any consideration therefor; and that it was inequitable for such bondholders, through the medium of a court of equity, to be allowed to sequester all the property of such new corporation for themselves, when they were indebted to that same corporation for unpaid stock, in an amount greater than the amount of their bonds.

It was for the evident purpose of escaping this inquiry that the bondholders and their trustees declined to produce the bonds in evidence.

The evidence in the case, even to the contents of the foreclosed mortgage, discloses without question that the new corporation was organized for the purpose of acquiring and owning all the straw-paper-mills in the Upper Mississippi Valley, embracing nine states, and that thirty-nine mills were acquired by it for the purpose of forming a monopoly in the manufacture and sale of straw paper throughout the United States, as the above region comprised about all the territory in the country in which such commodity was being manufactured.

Other minor grievances are complained of by petitioners, which arose during the progress of the cause in the Circuit Court, and which prevented petitioners from securing the aid of the court in raising issues and introducing evidence thereon. Amongst those was the action of the court in lismissing petition-

ers' cross bill on a mere motion, after the defendants had answered and replications had been filed.

It is submitted, that the statement of facts on page 13, *post*, supported by the record, will conclusively demonstrate that the above is a fair and indisputable statement of the controversies involved, and of the manner in which—as extraordinary as it may appear—the lower courts disposed of the same.

I.

The suit was brought in equity to foreclose a mortgage for one million dollars by the trustees named in the mortgage, The Northern Trust Company and Ovid B. Jameson. The mortgagor corporation, Columbia Straw Paper Company, was sole defendant.

Petitioners, as stockholders of defendant, were allowed to defend against the foreclosure because the mortgagee-bondholders were in control of the corporation, and were not making proper defense. Petitioners, in their answer, while admitting that the bonds secured by the mortgage had been, in fact, executed by the mortgagor-corporation, yet they expressly denied that such bonds were duly issued, negotiated and sold, or were outstanding and valid obligations of the defendant corporation.

The cause was referred to the Master, before whom none of the bonds (1,000 in number), nor any of the interest coupons, were produced in evidence, nor their absence accounted for.

Yet that officer found and reported to the court that all the bonds were negotiated and sold, and were outstanding and valid obligations of defendant corporation, and that they were secured by the mortgage sought to be foreclosed. He further found and re-

ported that there was interest due on the bonds, and unpaid (whether evidenced by interest coupons or not, he did not report), to the amount of $249,632.86.

For such principal and interest ($1,249,632.86), he recommended the foreclosure of the mortgage and sale of the mortgaged premises.

The circuit court overruled the exceptions of petitioners taken to the report of the Master in finding and reporting as above, and held, that the production of the bonds and interest coupons, in evidence, was not necessary until after the sale of the mortgaged premises, when the distribution of the proceeds of sale was about to be made.

That view was also taken by the Circuit Court of Appeals, which held (on the theory *ab inconvenienti*), that it would be impracticable to require all the evidence of mortgage-indebtedness to be presented in cases like the one at bar, before entering the decree of foreclosure and sale. (80 Fed. Rep. 450.) On page 455 the court say:

"In these cases where bonds issued by railroads or other large corporations on a large scale, and held in trust by trustees, but really owned by persons in many parts of the civilized world, it has not been the practice, nor would it be practicable to require the bonds to be produced before the court or Master before a decree *nisi* is entered. The practice has uniformly been to enter a decree of sale without the production of the bonds. Of course they can not be paid or share in the proceeds of sale until brought into court for payment and cancellation. In many cases years elapse after a decree is entered before all the bonds are brought in, the money lying in the registry of the court awaiting their presentation for payment, and in some cases all the bonds are never produced or paid. If the rule required all the bonds to be produced be-

fore the court or Master before a decree for sale could be made, it would in many cases be a practical denial of justice. No such practice has ever obtained to our knowledge. The sale is made for the benefit of all properly concerned. The decree is not final as to the persons or debts entitled to share in the proceeds. When the time for distribution arrives any creditor may challenge the title of the claimant of any bond presented."

It was urged upon both lower courts, on behalf of petitioners, that, admitting there was evidence before the Master which *prima facie* made a case of a mortgage duly executed, and sufficient mortgage indebtedness outstanding, and other facts to justify a decree of *foreclosure*, yet there ought not to be a *final decree* of sale until the cause should be again referred to the Master to ascertain and report the amount of the bonds and coupons outstanding. That in order to make such finding, the Master must have before him competent, legal evidence of such mortgage indebtedness, viz., the bonds and interest warrants, with the evidence of their respective owners or holders, as to the circumstances under which they came into their ownership or custody.

Petitioners insisted upon such proof, not to delay mortgagees or to throw legal obstacles in their way, but for the purpose of showing upon such examination that the owners and holders of the bonds and interest warrants had come by the same as part of the wrongful scheme to defraud the mortgagor-corporation and petitioners and other honest stockholders.

Their counsel before both courts, as well as before the Master, cited numerous cases where it had been held that, before a decree of foreclosure *and sale* could be ordered (*i. e.*, a final decree), it was indispensable that proof should be made of the amount of the mort-

gage-debt, even (in some cases) where a default had been taken against the mortgagor.

Their contention was there, as here, that it was not a question of what would be the more *convenient* practice, but of *substantive legal requirement*: that the mortgagor had a legal right, before its property should be sold to satisfy its mortgage indebtedness, to have that indebtedness judicially ascertained by legal proof.

Both the Circuit Court and the Circuit Court of Appeals seemed to regard the decree which was entered as a decree *nisi*, and that the *final decree* would not come until the property should be sold, its proceeds paid in and be ready for distribution amongst the mortgagee-bondholders, when the court should come to finally direct the disposition of the proceeds of sale.

But it was submitted for petitioners that this very decree was final as to the mortgagor-corporation; that before its property should be sold, the amount of its indebtedness, under the mortgage, should be ascertained by legal methods; so that if it should elect, it might pay the very amount thereof and prevent a sale; or, if a sale should be made, the amount necessary to be produced on such sale should be judicially ascertained. Because, from such sale, the defendant corporation could redeem in twelve months, by paying the amount of the sale with interest; and, for any deficiency, the defendant company would be liable to a judgment.

Counsel for petitioners urged upon the lower courts, as well as upon the Master, that for the Circuit Court to order a sale of the mortgage premises, before requiring legal evidence of the mortgage debt, with the purpose, as announced in the opinion of the learned Circuit Court of Appeals, of afterward requiring such evidence when the proceeds of the mortgage sale should be ready for distribution amongst the bondholders,

would be to postpone an indispensable legal requirement in disposing of the controversy between mortgagees and mortgagor until it would be *too late* to afford the latter any redress, in case the Master and the Circuit Court had *estimated* the mortgage debt at too great a sum; that in the foreclosure of a mortgage in equity, in addition to a judicial finding that the mortgage is a valid lien, it is also essential that the amount of the mortgage debt be ascertained; and that this must be done by legal evidence. In this case the mortgagor-corporation was decreed to be indebted for the full amount of the mortgage-debt, and to pay the same in ten days; in default of which the entire mortgaged premises were directed to be sold by the Master. Such a decree is certainly a final one, so far as the mortgagor is concerned. Whatever may be the result of any subsequent controversy between the bondholders over the distribution of the proceeds of sale can not concern the mortgagor, because it will not be a party to such controversy. Its indebtedness has been fixed; its property will have been sold to pay that indebtedness; and if, in the subsequent distribution of the proceeds of sale, it shall be found that the indebtedness was fixed at too great an amount, that discovery will come at too late a stage in the proceedings to give the mortgagor any relief.

That the above propositions are supported by the decisions, we refer the court to the following cases:

Dowden v. *Wilson*, 71 Ill. 485, 487–488.
Moore v. *Titman*, 35 Ill. 310.
Lucas v. *Harris*, 20 Ill. 166.
George, Admr., v. *Ludlow*, 66 Mich. 176.
Biers v. *Hawley*, 3 Conn. 110.
Field v. *Anderson*, 55 Ark. 546.
Schumpert v. *Dillard*, 55 Miss. 348, 363.

2 Jones on Mort., § 1469.
Shellaber v. *Robinson*, 97 U. S. 68. (Trust deed in equity is a mortgage.)

The learned Circuit Court of Appeals, it is submitted, was in error regarding the cases of *Guarantee Trust Co.* v. *Green Cove Springs and M. R. Co.* (139 U. S. 150) and *Toler* v. *Railway Co.* (67 Fed. 168).

In the former case this Court held that there was sufficient evidence before the court below to enable the plaintiff to maintain its bill, and that therefore it was error for that court to have dismissed the bill. This Court said: "Should the court proceed to a decree for "foreclosure and sale, the holders of the bonds can be "notified to appear and file them before the Master, and "all questions connected with their amount and owner-"ship can be settled upon *a final hearing.*"

In the case of *Toler* v. *Railway Co.*, *supra*, the distinction between a decree for foreclosure (in the nature of an interlocutory decree) and a decree for a foreclosure *and sale* (a final decree) is clearly pointed out. The court say (p. 181): "Should a decree of sale be "made absolute, the holders of bonds can then be re-"quired to produce their bonds and coupons before a "master, and all questions connected with the amount "due each, and of ownership, can then be determined." * * * "The decree for a foreclosure only establishes "that there has been a default in the payment of the "last three installments of interest." And the court thereupon directs a decree *nisi* to be drawn.

That the decree entered in this cause was, a final hearing of this cause, consummated by a final decree, see:

Forgay v. *Conrad*, 6 How. 201.
Railway Co. v. *Swasey*, 23 Wall. 405.

Grant v. *Insurance Co.*, 106 U. S. 429.
R. R. Co. v. *Soutter*, 2 Wall. 440.
Blossom v. *R. R. Co.*, 1 Wall. 655.
Hinckley v. *R. R. Co.*, 94 U. S. 467.
Ray v. *Law*, 3 Cranch 179.
Bronson v. *R. R. Co.*, 2 Black 524.
R. R. Co. v. *Fosdick*, 106 U. S. 47.
First National Bank v. *Shedd*, 121 U. S. 74.
Bostwick v. *Brinkirhoff*, 106 U. S. 3.

It is therefore respectfully submitted that this is the only case to be found in the books, of a decree for the foreclosure and sale of mortgaged premises being allowed to stand, where no evidence was introduced of the amount of the mortgage-debt by the production of the instruments representing the same, or their absence being accounted for, and where there was no waiver by the contract of the parties or by their stipulations in the pleadings.

II.

The respondents, in their bill of complaint, alleged that, "on or about the 22d of January, 1895, an exe- "cution was duly sued out against the chattels and "property of said defendant Columbia Straw Paper "Company, upon a judgment obtained against said "company, by James Flanagan, before George W. "Underwood, justice of the peace, Cook county, Illi- "nois, and the said defendant Columbia Straw Paper "Company has failed to remove, discharge or pay "such execution, although duly requested so to do." (Rec., p. 18.)

The transcript of the record of above mentioned judgment, introduced in evidence by respondents, shows

the suit commenced on January 22, 1895; summons issued returnable January 28, 1895; served upon the president of the defendant company at 5 o'clock P. M. of that day; the appearance of such president before the justice, and consent to go to immediate trial, and judgment for $180 and costs of suit, and immediate execution sworn out. (Rec., 275, 276.)

The execution came into the hands of the constable on the same day, at 5:24 o'clock P. M., and two months after was returned by that officer, "*nulla bona*"—without any levy being made, or any demand on the defendant in the execution for payment. (Rec., 277.)

Later on the same day, January 22, 1895, the following instrument was executed by respondents:

"CHICAGO, January 22, 1895.

"*To Columbia Straw Paper Company:*

"A judgment having been entered against you in "the court of George W. Underwood, justice of the "peace for Cook county, Illinois, on the 22d day of "January, 1895, in favor of James Flanagan, and "execution upon said judgment having been sued out "against your property, and you having failed to forth-"with remove, discharge or pay said execution, the "undersigned as trustee under the trust deed executed "by you to them under date of December 31, 1892, do "hereby declare the principal and all interest owing "upon the one thousand bonds named and described "in said trust deed to be immediately payable.

"(Signed)

"THE NORTHERN TRUST COMPANY,

"By BYRON L. SMITH, its *President*.

"Attest:

"ARTHUR HURTLY, *Secretary*.

"OVID B. JAMESON."

Trustees.

(Rec., p. 271.)

There was no evidence introduced that the above declaration was ever delivered to, or came to the

knowledge of, any of the officers or agents of the mortgagor-corporation.

On the evening of the same 22d day of January, 1895, respondents took possession of the property, including a large number of the paper mills of defendant mortgagor-corporation. (Rec., pp. 288 and 289.)

Two days later, on the 24th of January, 1895, respondents filed their printed bill of foreclosure in which they relied upon the above judgment, execution and declaration to foreshorten and make immediately due the whole $1,000,000 of bonds. (Rec., pp. 1, 18.)

In short, the record discloses that on account of an execution being issued by a justice of the peace for less than $200 after the close of business hours, the respondents, later in the same evening, declared due a mortgage indebtedness of $1,000,000, none of which was due, and a large part of which could not become due for many years, and that, standing upon such action, respondents, two days later, filed their bill to foreclose that mortgage, and have actually obtained their decree for a sale of the mortgaged property to pay the entire amount of the mortgage debt.

That such hot haste, under such peculiar circumstances, is not favored by the courts. See:

Union Mut. L. Ins. Co. v. *Union Mills Plaster Co.*, 37 Fed. 289.

Inman v. *West. Fire Ins. Co.*, 12 Wend. 452.

Bennett v. *Lycoming, etc., Ins. Co.*, 67 N. Y. 274, 276–277.

Noyes v. *Clark*, 7 Paige 170.

III.

The answer of your petitioners set up, as an equitable set-off to the amount that might be found due from

the mortgagor corporation to each bondholder on account of his bonds and coupons, an indebtedness owing by said bondholder to said mortgagor corporation on his subscription to the capital stock of the corporation *as an original subscriber*.

The facts alleged in the answer showed that the issue of the bonds and of all the capital stock of the corporation to your petitioners and others, in payment for the paper mill plants and to the bondholders, was one and the same transaction. That at the time the bonds were issued and paid for, the stock was issued to these petitioners who paid full value for it. That at the time of issuing the bonds, the company, by its board of directors, who were in the complete power of the bondholders, issued $2,113,000 of the capital stock to these bondholders, who took and now hold the same, all without any consideration therefor and without the knowledge, acquiescence or ratification of these petitioners, and other stockholders paying full value, and that the issue of such stock had been kept a secret from them.

The following is a correct statement of the facts in the case.

Statement of the Case.

1. This was a suit brought January 24, 1895, in the Circuit Court of the United States for the Northern District of Illinois, to foreclose a trust deed dated December 31, 1892, securing an issue of 1,000 bonds of $1,000 each, aggregating $1,000,000. This trust deed was made to The Northern Trust Company and Ovid B. Jameson, Trustees, by the Columbia Straw Paper Company, a corporation incorporated under the laws of New Jersey. A receiver was appointed under this bill,

and ancillary proceedings were immediately begun in the United States Circuit Courts for the Southern District of Illinois, the Western District of Missouri, the Southern District of Wisconsin, the District of Michigan, the District of Indiana, the Southern District of Ohio, the Northern District of Ohio, the Southern District of Iowa and the District of Nebraska.

2. The petitioners are stockholders of the Columbia Straw Paper Company, and as such were permitted to become parties to the suit (Rec., p. 91) May 13, 1895, on showing that the Columbia Straw Paper Company was making no defense to the suit.

3. In 1890 a syndicate was organized for the purpose of acquiring all the straw paper mills in the United States, at that time seventy in number, the object being to form what is in commercial language termed "a trust." The panic of that year caused the scheme to be abandoned, and the options which had been secured on the mills lapsed. (Rec., p. 413.)

4. In 1892 this claim was revived headed by one Philo D. Beard, who became the president of the Columbia Straw Paper Company on its organization, and Samuel Untermyer of the law firm of Guggenheimer, Untermyer & Marshall, whose business was that of promoting enterprises involving large aggregations of capital. (Rec., p. 417.) After the organization of the mortgagor company the firm of Guggenheimer, Untermyer & Marshall became its general counsel in the city of New York, and they employed the firm of Dupee, Judah, Willard & Wolf to aid them in acquiring the mills referred to.

5. In order to get the mill owners into the combination, a form of option was prepared by Samuel Untermyer providing that a corporation was to be organized under the laws of New Jersey, with a capital of $4,000,-

000, divided into $1,000,000 of preferred stock and $3,000,000 of common stock; it also provided that the corporation might, if found necessary, issue bonds to the amount of $1,000,000. The options ran to Philo D. Beard and Thomas T. Ransdell, of Buffalo, New York, and provided that they should provide all the means necessary to finance the corporation to be organized. (Rec., p. 607.)

6. Options were secured on thirty-nine of the seventy mills, with their good-will, for $2,788,000, payable as follows: $766,000 in cash, $629,000 in preferred stock, $1,258,000 in common stock, and $135,000 in notes of the corporation to be organized.

7. October 14, 1892, Thomas T. Ransdell assigned his interest in the options, without any consideration, to Emanuel Stein, and afterwards Beard, without any consideration, assigned his interest in the option also to Stein (Rec., p. 372), and Stein, under the instructions of Beard and Untermyer, accepted the options. On December 6, 1892, the Columbia Straw Paper Company was organized under the laws of New Jersey, with a capital stock of $3,000,000 of common stock and $1,000,000 of preferred stock, with authority to issue bonds amounting to $1,000,000.

8. Immediately following the organization and prior to December 14, 1892, the incorporators elected as a board of directors the following persons: Philo D. Beard, William C. Heppenheimer, William C. Taylor, Maurice Untermyer, Moses Weimann, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim, Samuel H. Guggenheimer (Rec., p. 192). Of these Maurice Untermyer and Moses Weimann were members of the firm of Guggenheimer & Untermyer; William C. Taylor, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim and Samuel H. Guggenheimer were clerks in the office

of Guggenheimer & Untermyer; William C. Heppenheimer was a lawyer residing at Jersey City, in the state of New Jersey, as it was necessary under the laws of that state that there be at least *one* resident director.

9. On the 14th day of December, 1892, Emanuel Stein, who held the options for the benefit of the promoters, and who, to use his own language, "was the conduit" through whom they acted (Rec., p. 398), at their instance (Rec., p. 376), made a proposition in writing to the Columbia Straw Paper Company (Rec., p. 485) to transfer to it the thirty-nine mills, and received in payment therefor its entire capital stock, less a few shares issued to the incorporators, and the entire authorized issue of bonds of the defendant corporation. This proposition was drafted by Samuel Untermyer (Rec., p. 376), a copy will be found in the record at page 485. This proposition was accepted by the defendant company on the following day and was then embodied in the form of a contract between the corporation and Stein.

10. It was represented to the mill owners when they gave their options on their mills that the entire seventy mills were to be taken into the combination and pass into the hands of the corporation, as on the basis proposed in 1890 seventy mills would have required and absorbed the stock of the corporation of $4,000,000 (Rec., p. 418). An examination of the amounts named in the options show that the thirty-nine mills were to be acquired for and were actually acquired for $766,000 in cash, $1,887,000 payable in stock, leaving a surplus of $2,113,000 of stock.

11. Stein testifies, and he is nowhere contradicted, that prior to the transfer of the mills pursuant to the options, the promoters, Beard & Untermeyer, agreed that this $2,113,000 of stock should be issued and di-

vided amongst themselves (Rec., p. 393); that they would put up $1,000,000 on the bonds of the corporation and make the cash payment to the mill owners according to the options (Rec., p. 392). Samuel Untermyer collected the money from the parties who subscribed to the bonds and who held the same at the time this suit was instituted, and placed the same in his name in The Northern Trust Company in Chicago (Rec., pp. 388 and 577), in order to provide Stein with the funds necessary to meet the cash payments according to the options at the time the mill owners conveyed their property to Stein and wife, and Stein and wife conveyed to the Columbia Straw Paper Company, which were contemporaneous transactions.

12. The mill owners, including these petitioners, did not know that Untermyer, Beard and the other promoters were appropriating to this end $2,113,000 shares of the capital stock of the defendant company without paying therefor (Rec., p. 420). This fact did not become known to these petitioners until after the suit to foreclose the mortgage was instituted.

13. In order to make the combination originally contemplated by the acquisition of the seventy mills the officers of the Columbia Straw Paper Company soon afterwards organized, under the laws of New Jersey, a corporation known as the Paper Commission Company. The function of this corporation was to handle the straw paper manufactured by all the straw paper manufacturers in the United States, which acquired the right to handle the entire product of the Columbia Straw Paper Company and of the thirty-one mills which did not become the property of the Columbia Straw Paper Company (Rec., p. 437). Instead of purchasing these thir y-one mills with the $2,113,000 of stock as was originally contemplated, the promoters ar-

ranged through the scheme of the Paper Commission Company to control the product of these thirty-one mills and appropriate to their own use, without giving any consideration to the defendant company, this $2,113,000 of stock.

The court below (Rec., p. 70, 80 Fed. 453) says that "The main question is, whether there is any liability "on the part of the stockholders in defendant com- "pany which can be enforced in this proceeding, or "set up as a reason for defeating the foreclosure. We "are of opinion that these contentions made by the "defendants were properly overruled. The prime dif- "ficulty was in the lack of evidence to support the "allegations of the answer. There was no evidence "of any fraudulent overvalution, or of issuing stock "without consideration."

And the court further says (Rec., p. 72, 80 Fed. 454), "The suit is not prosecuted on behalf of creditors, "and there is therefore no question here of the lia- "bility of stockholders."

With due and becoming deference to the opinion of the Circuit Court of Appeals we submit that the record does show, clearly and without contradiction, that the bondholders, represented by Untermyer & Wolf, first suggested the idea of consolidation of the mills in 1892 to the mill owners. The letter of Untermyer (Rec., p. 511), the option contract (Rec., p. 604), the testimony of Stein (Rec., p. 371) and of Sherwood (Rec., p. 414) all show it. The option-contract and Sherwood's testimony (Rec., p. 415) showed that it was agreed between petitioners and the bondholders represented by Stein, that *all* the stock was to be used in buying all the seventy milling plants instead of only thirty-nine. The testimony of Stein and the

exhibits show that $2,113,000 of stock was handed over to the bondholders as a gratuity. The option-contracts show that they were obtained for the benefit of the new company to be organized, and not for the benefit of Beard, Ransdell or Stein or the bondholders and that no more was to be paid for the mills than the option called for. Ransdell's sworn answer (Rec., p. 253) states this positively. Stein, Wolf, Beard, the bondholders and the board of directors all knew that the transfer to Stein and from Stein to the company was unnecessary and unexpected under the option contracts, and the only necessity of it was to get from the treasury of the company into the pockets of the bondholders *by form of legal contract* this surplus stock of $2,113,000 without any consideration; whereas, under the original agreement with the petitioners it was to be used in purchase of those thirty-one mills that were not purchased as agreed with the promoting bondholders, but which were afterwards tied up in consolidation with defendant company by means of what is known as the Paper Commission Company (Rec., p. 438).

By accepting this original issue of stock, each bondholder is liable for the full amount of the same. It is not necessary that there be an express subscription.

Webster v. *Upton*, 91 U. S. 65.

Upton v. *Tribilcock*, 91 U. S. 44.

This is the rule in reference to an original issue, although it is different in the purchase of stock in the open market, on a "going concern."

The act of the board of directors, in issuing this $2,113,000 not having been assented to, acquiesced in or ratified by the petitioners, the latter in equity, under

the averments of their answer, have the right to compel each bondholder to allow his indebtedness to be set off as against the indebtedness on his bond and coupons.

Cook on Stockholders, section 701 (3d edition).

The transaction concerning this original issue of the $2,113,000 of the stock to the bondholders, without consideration, under an agreement made in advance of the organization of mortgagor corporation, and carried out after organization by an abuse of fiduciary relations to that company, amounts to this:

The bondholders subscribed for $2,113,000 of original issue of stock, and instead of payment therefor, secured an agreement from the directors, *under their complete control*, that the company, for $1,000,000 advanced on their subscriptions, would give them a mortgage on the whole plant of the company, whereby the company was to pay back to them the money they advanced on their subscriptions.

See *Morrow* v. *Iron and Steel Co.*, 87 Tenn. 262.

Sawyer v. *Hoag*, 17 Wall. 610.

The mortgagor-corporation could not give away its stock as against non-assenting stockholders, any more than as against creditors.

Cook Stockholders (3d ed.), § 41.

Morawetz on Priv. Corp., §§ 270, 286, 288.

At § 286, Mr. Morawetz tersely states the rule: "Every shareholder in a corporation is entitled to insist that every other shareholder shall contribute his "ratable part of the company's capital for the common "benefit." * * * * "It would be a plain viola-

"tion of the equitable rights of those shareholders who "have contributed the amount of their shares in full, "to allow any persons to have the benefits of member- "ship, without adding the amounts of their shares to "the company's capital."

The circuit court should have refused to foreclose the mortgage for the bondholders, until they had paid the mortgagor-company the amount of their unpaid stock subscriptions.

IV.

After the taking of testimony before the Master, the respondents filed an amendment to their answer on February 9th, 1896. The amendment is in full in the Record, pp. 316 to 322. On March 4th the court refused to allow the amendment to be made (Rec., p. 325). The purpose of the amendment was to conform the pleadings to the proof, and to set up as a defense to the bill the fact that the execution of the bonds and mortgage was a part and parcel of a scheme to form an illegal combination in restraint of trade, commonly known as a trust.

The circuit court, sitting as a court of equity, as soon as the contents of the amendment was made known should have, *sua sponte*, allowed it to be filed. Courts of equity ought not to, and will not, enforce illegal contracts, but will leave the guilty parties where they find them. A good illustration is the case of *Richardson* v. *Buhl*, 77 Mich. 632, where the court acted voluntarily, as soon as it learned the contract under consideration was made in pursuance of the formation of a "trust."

That the defendant-company, Columbia Straw Paper Company, was an illegal combination is shown by

(1) Letter of Untermyer to Wolf (Rec., p. 511).

(2) Sworn answer of Ransdell (Rec., p. 252).

(3) Recitals in mortgage, "Exhibit A," to bill (Rec., pp. 24 and 27).

(4) Stein's proposition to board of directors (Rec., p. 485).

(5) Agreement between Stein and Company (Rec., p. 489).

(6) Paper Commission Company (Rec., p. 495) formed to take in balance of mills (Rec., p. 507).

(7) Sherwood and Stein's testimony (*passim*).

Even if the court would not admit the amendment, *sua sponte*, it ought to have done ~~so over objection of~~ on the motion of the defending Stockholders complaints.

C., M. & St. P. Ry. Co. v. *Third National Bank of Chicago*, 134 U. S. 276, pp. 288 and 289.

Starr and Curtis' Illinois Statutes, 1896, p. 1252.

Acts of Illinois, 1891, p. 206, section 5.

Acts of Illinois, 1893, p. 182, section 8.

U. S. Statutes at Large, 1890, p. —.

V.

The cross-bill was filed under leave of court granted upon a petition (Rec., p. 105) prepared according to the 94th equity rule. It asked affirmative relief, not for violation of any personal equitable rights of your petitioners (as was the case of *Forbes* v. *R. R. Co.*, 2 Woods 323, Fed. Cases No. 4926, cited as authority by the court below), but for and in behalf of the defendant company, mortgagor, whose board of directors was under the control of the bondholders, represented by the respondent trustees, and which company had filed an answer denying nothing in the bill.

The cross-bill was filed May 18, 1895 (Rec., p. 122), and the respondent trustees, the defendant company mortgagor, and certain of the bondholders, who were original promoters of the company, were made parties defendant. (*Braden* v. *Prime*, 14 Blatchf. 371, Fed. Case No. 1810.)

The respondent trustees, complainants, answered, as did almost all the defendants. (Rec., pp. 159 to 200 and 211 to 257.) Replications were filed by your petitioners to each of the answers. (Rec., p. 201 to 205 and 257 to 263), the last being filed on September 16, 1895.

January 13, 1896, the Circuit Court sustained the motion of complainants to strike the cross-bill from the files. (Rec., p. 314.)

The court below, as we understand from its opinion, bases its action in sustaining the Circuit Court in striking the cross-bills from the files on the following propositions:

(*a*) That your petitioners were defendants only by the permission and order of court. (80 Fed. 456.)

(*b*) That the matters set up in the cross-bill were substantially those set up in the answer, and, therefore, there was no need of a cross-bill. (80 Fed. 457.)

(*c*) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion. (80 Fed. 457.)

(*d*) That matters in cross-bill were not germane to matters in original bill. (80 Fed. 457 and 458.)

We first submit that, no matter under what circumstances a cross-bill is allowed to be filed in a cause, if once filed, an answer filed to it, then the cross-defendant has waived whatever right he may have had to move to strike it from the files. *A fortiori*, where replication is filed, and the cause at issue.

Payne v. *Cowan*, 1 Swed. & M. Chan. (Miss.) 35.

Glegg v. *Leigh*, 4 Madd. 191.

Betts v. *Lewis*, 19 How. 72.

(*a*) That your petitioners were made defendants only by permission of the court, and the cross-bill was filed under leave.

The court below justifies its action in sustaining the Circuit Court in dismissing the cross-bill on the decision in *Forbes* v. *Railroad Co.*, 2 Woods 323, Fed. Cas. § 4926.

But there is a wide distinction between these causes. In the Forbes case, the defendants filing cross-bills were seeking affirmative relief on behalf of their own private interests and not on behalf of the corporation. It was their individual equitable rights, and not those of the corporation, which were claimed to be invaded. The motion to dismiss went to the action of the court in allowing them to be made parties at all. In this cause, the matters set up in the petition and alleged in the cross-bill, which was verified by oath, were set up under the provisions of Equity Rule 94. The cross-bill is "founded on a right which may properly be asserted by the corporation." The averments of the cross-bill, with reference to the refusal of the company to assert its rights, were material averments. If insufficient in equity, the question could be raised by demurrer and

not by motion to dismiss. When answers were filed, a hearing was the only method of ascertaining their truth. By peremptorily dismissing the cross-bill, as the court did, the corporation has been caused to lo-e all equitable rights it may have on behalf of its innocent and minority stockholders, which was being urged by this cross-bill against the bondholders represented by the trustees. As is said in *Bronson* v. *L. & M. R. R. Co.*, 2 Wall. 283, which was decided prior to the promulgation of Rule 94 in Equity. "It would be a reproach to the "law, and especially in a court of equity, if the stock-"holders were remediless."

Another distinction between this cause and the Forbes case, *supra*, is that, in that case the defendants having made a *prima facie* case, they were allowed to defend. But *before* filing cross-bill, a rule was entered against them to show cause why the order permitting them to defend should not be vacated. A hearing was had, and on that hearing the court vacated the order, and expressly did so because there was much doubt whether the defendants were *bona fide* stockholders; that their contention was in behalf of their individual interests, and were *in opposition* to the interests of the company, and they admitted the truth of all the charges of gross fraud on the part of the board of directors of the company *of whom they were a part*.

In this case there is no dispute as to your petitioners being *bona fide* stockholders, nor of their asserting rights on behalf of the company, which is expressly stated to be under the control of the bondholders. Further, in this case a cross-bill has been filed. The action of the court in the Forbes case was the vacating of the order allowing the intervention for good cause shown. In this case the order allowing the intervention is not attacked, but allowed to stand, and the answer of

the intervenors is allowed to remain in and a hearing has been had and decree rendered on the same. Your petitioners are held rightly to be in court, and their answer recognized, but they are deprived of the benefit of their cross-bill on grounds which could only apply to vacating an order for good cause allowing them to intervene.

(*b*) That the matters set up in the cross-bill were substantially those set up in the answer, and therefore there was no need of a cross-bill.

We submit that the court below in its decision has failed to recognize that in equity a cross-bill may serve for two very different purposes. Affirmative relief in equity is not granted on an answer. It is granted only on a cross-bill. A cross-bill may be used for defense merely, or it may be used to obtain affirmative relief. In *Lautz* v. *Gordon*, 28 Fed. 264, the court recognized this distinction by pointing out that, when used as a defense, it may set up a legal as well as an equitable defense, whereas when used to obtain affirmative relief, it must set up facts calling for equitable relief only. In the latter case "the cross-bill is of the nature "of an original bill seeking further aid from the "court."

We believe the court below to be in error in stating that the answer and cross-bill set up substantially the same facts. The cross-bill contains additional facts to those set up in the answer.

The court is also in error, in stating as applied to this cause, that upon the filing of two answers setting up the same matter, one would be struck out on motion, and that the labeling of one of them as a cross-bill would not change the rule. The sentence does not

express the true statement of facts here. It would be better expressed by saying if two pleadings are filed containing exactly the same matter, and in one of which it clearly appeared that it was filed as a defense to the bill, and in bar of the suit; and in the other it clearly appeared that it was filed for the purpose of obtaining equitable *affirmative* relief; the former would be allowed to stand as an answer, the latter, as a cross-bill.

The cross-bill in this cause set up facts, and on those facts asked for an accounting in equity between the defendant company and the bondholders, represented by the respondents, on account of transactions between them and the company at the time of, and in connection with, the execution of the bond and mortgage. Under the answer, this equitable affirmative relief could not be granted.

Under Equity Rule 90, affirmative relief must be sought by cross-bill, as in the English High Court of Chancery.

White v. *Bower*, 48 Fed. 187, citing
Noonan v. *Lee*, 2 Black 499–509;
2 Dan'l Chancery Prac. 1547;
R. R. Co. v. *Bradley*, 10 Wall. 299.

In *Kingsbury* v. *Buckner*, 134 U. S. 650, a quotation is made from *Jones* v. *Smith*, 14 Ill. 229: "No fitter "case could be imagined for a cross-bill than the one "which is presented by these pleadings. No doubt "upon his answer, he (defendant) was at liberty to "prove the facts averred, but this would only defeat "Smith's (the plaintiff's) claim for relief; while the "*same facts, if established upon a cross-bill*, would en- "title him to have satisfaction of the judgment actually "entered."

(c) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion.

We respectfully submit to this honorable court that there is no logic or reason why the rule should be different. A cross-bill is in substance an original bill filed by the defendant in the cause to obtain affirmative relief, and also to bring before the court, completely, "the whole matter in dispute." Dan'l Chancery Pr. 1547.

If the permission is once given by the court to be made a defendant in the cause, it follows by all the rules of logic and reason, that he should be allowed, as a defendant, to assert all his equitable rights, and to obtain all his equitable remedies. On what ground can he be considered in court to file an answer, but out of court when he attempts to file a cross-bill? The case of *Forbes* v. *R. R. Co.*, *supra*, quoted from by the court below, does not hold any such doctrine. The court did not there enunciate the remarkable rule of practice in equity, that the court would allow the petitioner to become a defendant, recognize him as such, allow his answer to stand, and refuse to strike it out as the court below did in this case (Rec., p. 325), but dismiss the cross-bill for no other reason than that the rule is different as to original and cross-bills.

We submit that the rule is not different. That when a stranger to the original suit is once allowed to become a defendant, and files a cross-bill for affirmative equitable relief, then the rule is that his cross-bill must be tested by demurrer, or, if answered, shall go to a hearing, and that there is no more reason why a cross-bill should be dismissed than should an original bill.

(*d*) That matters in cross-bill were not germane to the original bill.

Webster defines "germane" to literally mean—near akin; and as a derivative meaning—closely allied—appropriate or fitting—relevant.

The court below says that the original bill is simply to foreclose a mortgage, and therefore the cross-bill is not germane. But this was the *object* only of the bill. The cross-bill was germane to the *subject*-matter of the original bill, which is the execution of the mortgage and bonds for the purchase-money of the milling plants, the validity of the same, the indebtednes of the company to each holder of the bonds, and the nonpayment and the resulting right of foreclosure. The cross-bill sets up an equitable set-off against each holder of the bond, and asks for an accounting. The case of the *Investment Corp.* v. *Marquan*, 62 Fed. 960, cited by the court below, does not apply, because in that case the alleged cross-bill was filed for defense merely, and in no sense asked for either discovery or affirmative relief, and in fact was not a cross-bill, and, not being such, was dismissed. But on the question of whether the cross-bill was germane or not to the original bill, we submit that it could not be dismissed. On that point it could only be struck down by a demurrer, or fail on the hearing.

Admitting, *arguendo*, that the circuit court could dismiss the cross-bill, without demurrer filed, or allowing it to go to a hearing, and after issues closed, on the sole ground that its contents are not germane to the subject-matter of the original bill, we submit that in this cause the subject-matter of the cross-bill is "closely allied, appropriate, fitting and relevant" to the subject-matter of the original bill.

The original bill sets out the execution of the bonds and trust deed, their validity, the indebtedness of the company to the bondholders, that the same is due and unpaid.

The cross-bill sets out that, in and by the same transaction which the indebtedness of the company on the bonds was created, the indebtedness of each bondholder on his stock subscription was created; that if the indebtedness of the company on the bonds is valid, the indebtedness of each bondholder on his stock subscription is valid; that if the indebtedness on the bonds is due and unpaid, so is the indebtedness on the stock subscription; that your petitioners, the cross-complainants, became stockholders at the same time with the bondholders, and by virtue of the same mutual agreement to organize the company; that they had no knowledge of, nor have they ratified or acquiesced in the action of the bondholders in taking their $2,113,000 of stock without any payment therefor. The cross-bill asks for an accounting as to each bondholder, who is the real party in interest, although represented by the mortgage trustees, and that the *company* shall have the affirmative relief of a decree against each bondholder for such amount as shall be found due over and above the amount due on each bond. The debts are shown to be mutual, and to grow out of the same transaction. It is a pure specimen of equitable set-off, which should be allowed.

That your petitioners can obtain such relief in this foreclosure suit seems clear, under

Equity Rule 94.

Bayless v. *Ry. Co.*, 8 Bissell 193.

Thomas v. *R. R. Co.*, 101 U. S. 71.

Thomas, Trustee, v. *Ry. Co.*, 109 U. S. 552.

Morawetz on Corp., section 306. Citing authorities.

Set-off is enforceable in equity where there are mutual debits and mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow set-off.

Gray v. *Rollo*, 18 Wall. 629.
Wanzer v. *Truly*, 17 How. 584.

The case of *Patterson* v. *Linde*, 106 U. S. 519, arose where stockholders of a corporation organized under a statute of Oregon had not paid their subscriptions in full.

The statute of Oregon is almost identical with the statute of New Jersey, under which the defendant company was incorporated. In that case, on page 521, this Court says, after holding that the suit should be in equity by the corporation against all the stockholders for the benefit of all the creditors:

"The liability of the stockholder to the creditor is "through the corporation, not direct. There is no "privity of contract between them, and the creditor "has not been given, either by the constitution or the "statute, any new remedy for the enforcement of his "rights. The stockholder is liable to the extent that "the subscription represented by his stock requires him "to contribute to the corporate funds, and when sued "for the money he owes, it must be in a way to put "what he pays, directly or indirectly, into the treasury "of the corporation for distribution according to law."

Beard, Untermyer, and others, bondholders, through respondents, call on the company in this suit for the debt represented by the mortgage, and in lieu thereof, ask for a foreclosure. The company can, in a suit in equity, call on Beard, Untermyer and others for their debt on the stock subscriptions. The debts and credits

are therefore mutual, and instead of the company bringing an independent suit against the stockholders, there should be set-off in this suit.

Wherefore your petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this court, on a day certain, to be therein designated, a full, true and complete transcript of the record, and of all proceedings of the said Circuit Court of Appeals in the said cause therein, entitled Harry W. Dickerman, Trustee, et al. *v.* The Northern Trust Company, and Ovid B. Jameson, Trustees, and Columbia Straw Paper Company, No. 344, to the end that said cause may be reviewed and determined by this court, as provided in section 6 of the act of congress, entitled "An act to establish circuit "courts of appeals, and to define and to regulate, "in certain cases, the jurisdiction of the courts of the "United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

Otto Gresham

Solicitor for Petitioners.

Copy

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1897.

Messrs. Dupee, Judah, Willard & Wolf, Solicitors for the Northern Trust Company and Ovid B. Jameson, Trustees:

In the suit mentioned in the annexed and foregoing petition, you will take notice that on Monday, the 29th day of November, 1897, at the opening of Court, or as soon thereafter as counsel can be heard, the petition, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision thereon.

OTTO GRESHAM,
Solicitor for Harry W. Dickerman et al., Petitioners.

Service of a copy of the foregoing notice and of the petition for a writ of *certiorari* annexed thereto, is hereby acknowledged this 29th day of November, 1897. Said 29th day of November, 1897, for its submission to the Supreme Court, is agreeable to us.

Charles A. Dupee
Monroe S. Willard

Solicitors for the Northern Trust Company and Ovid B. Jameson, Trustees.

Supreme Court of the United States.

October Term, A. D. 1898.

Case No. 15,734. Term No. 195.

HARRY W. DICKERMAN, TRUSTEE, ET AL.,
Petitioners,

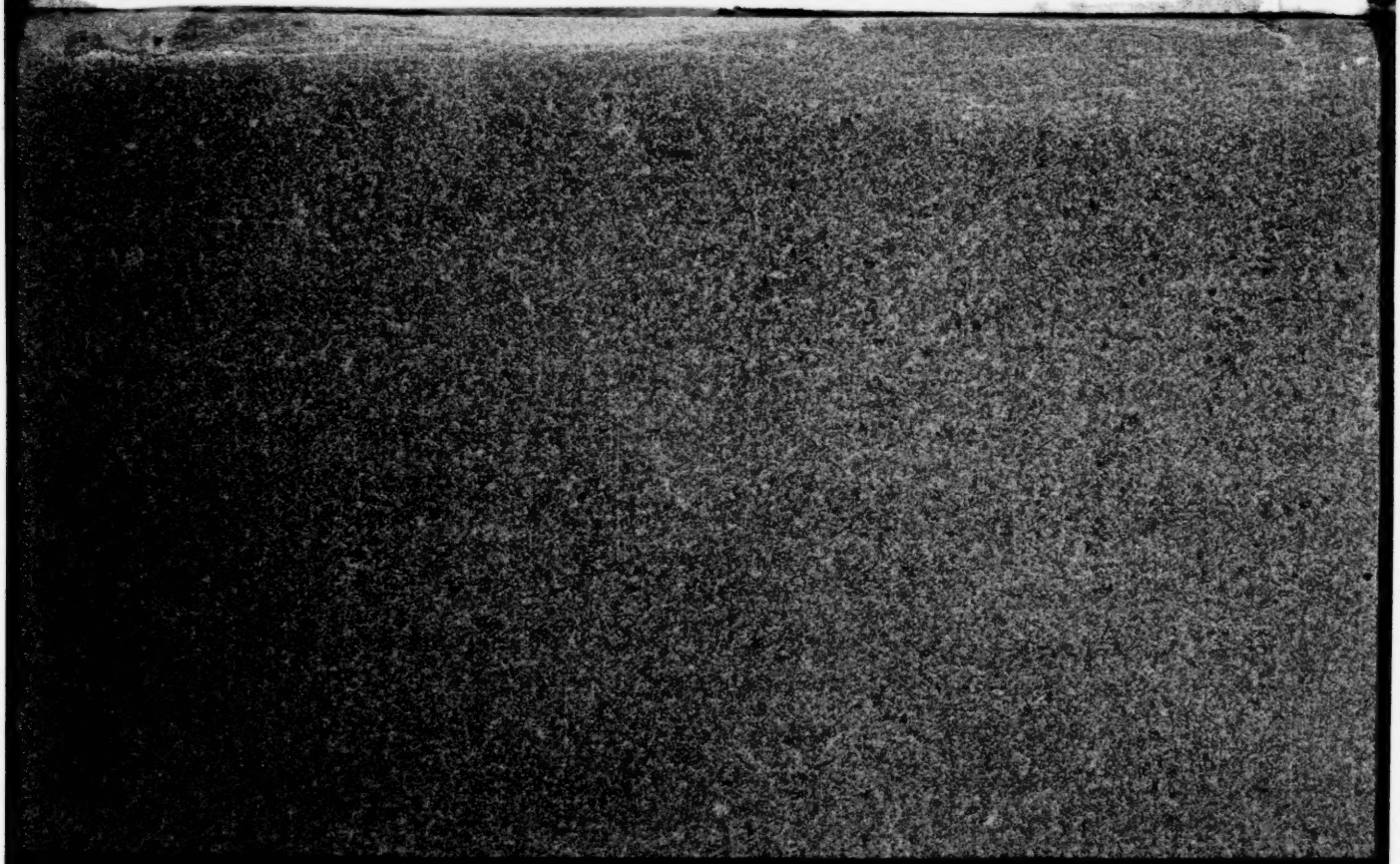
vs.

THE NORTHERN TRUST COMPANY ET AL.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Brief for Petitioners.

MONETTE PRINTING COMPANY, 1528 WEST LAKE ST., CHICAGO



—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 196.

HARRY W. DICKERMAN, TRUSTEE OF THE SECOND NATIONAL BANK OF ROCKFORD, ILLINOIS, ET AL., *Petitioners,*

vs.

THE NORTHERN TRUST COMPANY and OVID B. JAMESON, *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Brief and Argument for Petitioners.

STATEMENT OF FACTS.

The Pleadings.

The questions here presented for review arose under a bill in equity filed by respondents as mortgagees to foreclose a mortgage in the form of a deed of trust executed to them by the Columbia Straw Paper Company, a corporation resident and citizen of the State of New Jersey. One of the respondents, The Northern Trust Company, is an Illinois corporation, the other, Ovid B. Jameson, is a citizen of Indiana.

The bill was filed in the Circuit Court for the Northern District of Illinois on January 24, 1895; and it was therein averred that different tracts of the real estate, leaseholds, water powers, etc., so mortgaged, were situated in the Northern District of Illinois. The property included in the mortgage sought to be foreclosed, was situated in thirty-two counties, in nine different States, being Illinois, Indiana, Iowa, Michigan, Wisconsin, Kansas, Nebraska, Missouri and Ohio.

The mortgage, executed in the form of a deed of trust by the Columbia Straw Paper Company to respondents as trustees, recites that it was given to secure 1,000 bonds of the paper company of $1,000 each, and that those bonds were issued and delivered to one Emanuel Stein in part payment for the properties acquired by it from said Stein.

The bonds (alleged copies of which were made part of the bill for foreclosure) provided that they were to mature only on the happening of the following conditions:

1st. When the designated number of bonds should have been first drawn by lot for redemption by the Northern Trust Company.

2nd. When the paper company should have made default in the payment of the interest for three months, and the bearer or registered holder should give written notice to that company that he had called in the principal moneys thereby secured.

3rd. When a judgment or order should be made, or an effective resolution passed for the winding up or dissolution of the company.

4th. When the security of the mortgage should become

enforceable and was being enforced, and the Northern Trust Company should, in the exercise of any power thereby conferred, declare that the principal of the bonds should become immediately due and payable.

The above are the conditions provided for in the bonds themselves for their maturity. (Rec. p. 26.)

By the mortgage (a copy of which was made part of the bill for foreclosure) it was provided that the security thereby created should become enforceable, if after the happening of any one of the following events, the trustees should declare the principal and interest owing upon the bonds to be immediately payable:

1st. If any of the bonds should become due and payable according to the tenor thereof and default should have been made in the payment of one or more of them for one calendar month thereafter.

2nd. If default should have been made in the payment of any part of the interest on any of the bonds, or in the performance of any of the covenants or conditions in the bonds or mortgage, and such default should have been continued for three months, after written demand for payment or performance by the Northern Trust Company to the mortgagor corporation.

3rd. If the mortgagor should default in the payment of taxes, etc., on the mortgaged property, or fail to keep it insured, etc., and any such failure should continue for thirty days after demand in writing upon it.

4th. If a judgment or order should be made, or any effective resolution of the mortgagor should be passed for winding it up, "or if a distress, attachment, garnishment or

execution, be respectively sued out against any of the chattels or property of either company, and such company shall not forthwith, upon such distress, attachment, garnishment or execution being levied or sued out, remove, discharge or pay such distress, attachment, garnishment or execution." (Rec., pp. 30, 31.)

In the bill of complaint it is alleged, as the only grounds for enforcing the security of the mortgage, first that the mortgagor had made default in redeeming or discharging the several amounts of bonds designated in the mortgage and bonds for redemption, and also in the payment of certain installments of interest. But, as in the first case, no allegation was made in the bill nor facts shown in the evidence, that The Northern Trust Company had first ascertained what bonds were to be redeemed, by the drawings which it was charged with; nor in the other matter, of non-payment of interest, that the owners or holders of the bonds whose interest was in default, or The Northern Trust Company had, on the one hand, by written notice to the mortgagor, called in the principal of such bonds, or, on the other, made written demand of the mortgagor for such interest, no further consideration of such alleged defaults need be given.

The only other ground for declaring the principal of the bonds due or for enforcing their security, either mentioned in the bill or shown by the evidence, is contained in the following allegation of the bill: (Rec., p. 15.)

> "VIII. Further complaining, your orators allege that on or about the twenty-second day of January, 1895, an execution was duly sued out against the chattels and property of said defendant, Columbia

Straw Paper Company, upon a judgment obtained against said defendant by James Flanagan before George W. Underwood, justice of the peace, Cook County, Illinois, and the said defendant, Columbia Straw Paper Company, has failed to remove, discharge or pay such execution, although duly requested so to do."

In the bill it is then averred "that by reason of the premises" the complainants (respondents) had declared the principal and interest on the 1,000 bonds to be immediately due and payable.

That declaration was in writing and was introduced in evidence as follows: (Rec., p. 220.)

"CHICAGO, January 22, 1895.

"To Columbia Straw Paper Company:

"A judgment having been entered against you in the "court of George W. Underwood, justice of the peace for "Cook County, Illinois, on the 22nd day of January, 1895, "in favor of James Flanagan, and execution upon said judg- "ment having been sued out against your property, and "you having failed to forthwith remove, discharge or pay "said execution, the undersigned as trustee under the trust "deed executed by you to them under date of December "31, 1892, do hereby declare the principal and all interest "owing upon the one thousand bonds named and described "in said trust deed to be immediately payable.

"(Signed)

"THE NORTHERN TRUST COMPANY,
"By Byron L. Smith, its President.
"Attest:
"ARTHUR HUERTLY, Secretary,
"Ovid B. Jameson,
(SEAL)

} Trustees."

The above is the only evidence of the action taken by the respondents or either of them in declaring the principal of the bonds due; and there is no evidence that the writing was ever served upon, or its contents made known to, any officer, agent or attorney of the mortgagor.

The bill of complaint further states that complainants had taken possession of the plants and property of the mortgagor company under the provisions of the mortgage. Prayer is made for the foreclosure of the mortgage, for a receiver, injunction, an accounting on the bonds and coupons, ascertainment of names of lawful owners thereof, and for general relief.

On the same day on which the bill of complaint was filed, upon the consent of the defendant, a receiver was appointed for all its mortgaged property.

Later, on March 22, 1895, the mortgagor filed its answer substantially admitting all the allegations of the bill, and the claims put forth by the plaintiffs therein.

After replication had been filed to such answer but before the cause had been referred to the Master, and on May 13, 1895, petitioners, together with others, filed their petition in the cause, setting forth, *inter alia*, that they were stockholders of the defendant company, and had been injured by the wrongful and fraudulent manner in which its securities had been issued; that the defendant and its defense were under the control and direction of the bondholders and their trustees; and prayed to be made defendants and be allowed to plead, answer or demur to the bill of complaint, and to file a cross-bill.

On the same day the court entered an order that petitioners be made parties defendant to the original cause, with leave to file an answer and cross-bill. (Rec., p. 85.)

On May 18, 1895, petitioners filed their answer to the bill. In that answer petitioners, while admitting that the mortgage and bonds were executed and issued by the mortgagor company, in its corporate name, yet they denied that the holders of the bonds were entitled to the benefit of the trust alleged to have been created by the mortgage, and further denied that all of the 1,000 bonds were duly issued, negotiated and sold, or that they were outstanding and valid obligations of the mortgagor, or that all such bonds or interest coupons had come into the possession of or were held by persons who had become the owners thereof in good faith and for a valuable consideration. They further claimed that the bonds provided for usurious interest, contrary to the laws of the State of Illinois.

Petitioners thereupon set forth in great detail as to names, amounts, times and acts done, the manner in which a combination had been formed in the summer of 1892 to purchase seventy paper mills with their plants, appliances, good will and businesses, by means of securing from their respective owners option contracts, whereby each owner should agree to sell his property to the combination for a stated sum in cash, and the balance in the capital stock of a corporation to be organized, to which the seventy paper mills, with their properties, appliances, business and good will were to be conveyed.

That such corporation should have a capital stock of $4,000,000, consisting of $1,000,000 preferred and $3,000,000 common stock; that the stock was to be issued at par

until the whole amount should be exhausted, and in that event the corporation was to have the power to issue $1,000,000 of its bonds secured by mortgage upon its property; that option contracts were accordingly obtained upon the above representations to the owners of the different paper mills.

But, instead of securing such option contracts for the seventy mills, the combination secured the same for only thirty-nine mills; that the total purchase price for the thirty-nine mills, as provided in the several option-contracts, was only the sum of $2,788,000 as follows: 766,000 in cash, $629,000 in preferred and $1,258,000 in common stock and $135,000 in the promissory notes of the proposed corporation; that the combination thereupon caused the option-contracts (which had at first been taken running to two other persons) to be transferred by them to one Emanuel Stein; that the combination then arranged to divide up amongst and fraudulently appropriate to themselves $2,113,000 of the capital stock of the proposed corporation, which would not be required to pay for the thirty-one paper mills which were left out of the combination:

That after having arranged just how many of the 1,000 mortgage bonds of the new corporation each member of the combination was to receive for an equal amount of cash, and how many shares of preferred and common stock each was to receive gratuitously with bonds, they then on December 6, 1892, caused articles of incorporation to be filed in the State of New Jersey to organize the paper company with a capital stock of $4,000,000, with themselves and their agents in its directory; that on December 14, 1892, they procured the said Stein, who held the option contracts for

the purchase of the thirty-nine mills, to present to the stockholders (consisting wholly of the members of the combination) a proposition to secure the titles to the thirty-nine paper mills and convey the same to the new corporation for $5,000,000 as follows: $1,800 in cash, $1,000,000 in the first mortgage bonds, $1,000,000 in the preferred and $2,998,200 in the common stock of the new company; that this proposition was accepted by the stockholders and also by the directors, the property was conveyed to the company and the bonds and capital stock were divided amongst the members of the combination as had been previously arranged, and that such persons still owned them and were still liable for their capital stock in a much larger amount than the bonds of the company; and that the latter were owned by the same persons, who were liable on their stock.

In pursuance of the order of the court granting petitioners leave to file an answer and cross-bill, on May 18th, 1895, they filed their cross-bill. In that pleading they set forth the scheme or plan by which the various persons, who were made defendants to the cross-bill, acquired their bonds and shares of stock in the mortgagor corporation, the same as had been stated in petitioners' answer. Their grievances were substantially as follows: That they were *bona fide* holders of the stock of the paper company, having acquired it as part payment for the respective paper mills and plants, which they, or their assignors, had conveyed to said Emanuel Stein under the option contracts so held by Stein; that they had no knowledge or information of the wrongful acts committed by the defendants to the cross-bill, and were not parties thereto nor participators therein; that the wrongful

acts of defendant consisted (briefly stated) in such defendants having secured option contracts from the different owners of the thirty-nine paper mills for the total purchase price of $2,783,000, in cash, capital stock and notes of the proposed company, as stated in the answer, and having said option contracts transferred to said Emanuel Stein, who held them for the benefit of all of the defendants; that the latter thereupon agreed among themselves to organize the new proposed corporation, with a capital stock of $4,000,000, and first mortgage bonds of $1,00,000, all of which were to be divided up amongst defendants in proportions agreed upon, except sufficient stock to pay the mill owners the part of their respective purchase prices payable in stock. The latter would require $1,887,000, leaving $2,113,000 in capital stock for division amongst defendants, and $1,000,000 in first mortgage bonds: That defendants would have to pay in cash to the mill owners, and to furnish working capital for the new company, about $1,000,000; that amongst the defendants furnishing such money, the $1,000,000 of first mortgage bonds and $2,113,000 in capital stock would be divided: That the above scheme was carried out by organizing the new company, and then by having Mr. Stein secure from its stockholders and directors a contract by which he should cause to be conveyed to the new corporation the various thirty-nine paper mills, plants, businesses, and good will, and should receive in payment therefor the $1,000,000 of bonds secured upon the properties conveyed, the $1,000,000 of preferred stock, $3,000,000 of common stock, except $1,800 in amount, which had been theretofore issued to enable defendants to organize and put the new company into operation, and which was

made good to Mr. Stein by including in his purchase price a like amount of cash: That the above contract of purchase by Mr. Stein was carried out, and all the bonds and the shares of capital stock, left over after paying the mill owners, were divided up amongst the defendants, who were all the time in full control, either in person or by their agents, of the recently organized corporation: That defendants and the stockholders and directors of the new company knew that the properties so acquired from said Stein, at the purchase price paid therefor by the company, were overvalued by the sum of $2,113,000. It is then averred that the defendants, who so received said bonds and stock, are still the owners thereof, and they were each made defendants to the cross-bill to the number of nineteen.

The cross-bill also contained an averment that the defendants had withdrawn over $3,000,000 of bonds and stock from the company without paying therefor.

The prayer of the cross-bill, *inter alia*, was for an accounting in respect to the transactions complained of, especially in reference to the issue of the alleged mortgage bonds; that an accounting might be had on the part of the defendants in respect to the issues of the shares of preferred and common stock, and that if, on such an accounting, anything should appear to be due from any of the said defendants to the defendant, the Columbia Straw Paper Company, a decree might be entered for the payment of the same, the cross-complainants being ready and willing to pay to the defendant, the Columbia Straw Paper Company, what, if anything, might be found to be due from them; that the receiver George P. Jones theretofore appointed

might be removed and a competent and practical man appointed receiver in his stead, with the usual powers of receivers in equity, and be directed to take possession of all of the books, papers and writings of the Columbia Straw Paper Company.

Answers were filed to the cross-bill by the plaintiffs in the original bill (respondents) and by the mortgagor corporation, and by eleven of the other defendants, who were charged with being owners of the alleged bonds, and demurrers by two others, to which answers replications were filed by cross-complainants.

Whilst the proceedings under the cross-bill were thus pending before the court, the plaintiffs in the original bill (respondents) made an oral motion to strike the cross-bill from the files, which motion was unsupported by any affidavit, documentary or other evidence. And, later on, the court sustained the motion, without stating any grounds or reasons therefor. (Rec., p. 256.)

At the time the motion was made, and when it was sustained by the court, the plaintiffs [respondents] had filed their answer to the cross-bill, to which the cross-complainants had filed their replication.

The Facts.

THE ORIGINAL CAUSE HAVING BEEN REFERRED TO THE MASTER ON THE ISSUES MADE BY THE ORIGINAL BILL AND ANSWERS THERETO, (AND NOT ON THE ISSUES MADE BY THE CROSS-BILL AND ANSWERS THERETO,) TO TAKE TESTIMONY AND REPORT, EVIDENCE WAS HEARD BY HIM, PROVING, OR TENDING TO PROVE, ON THE PART OF THE RESPONDENTS, THE FOLLOWING FACTS:

James Flanagan, of New York claimed to own ten bonds, he having signed a request to the trustees to foreclose the mortgage shortly before or after January 22d, 1895. (Rec., p. 231.) There were twenty coupons for $30 each, representing overdue interest on those bonds.

A short time before January 22d, 1895, six of those coupons were sent to Mr. Wolf, a member of the firm of attorneys in Chicago, who had been representing the paper company in the west until a few weeks prior to that time. Mr. Wolf turned over the coupons to another attorney with instructions to bring suit on them (Rec., pp. 395-484) within twenty-four hours, and on January 22d suit was brought on the coupons against the paper company before a justice of the peace in the city of Chicago, and summons was served upon Mr. Beard, the president of the paper company, at 5 o'clock P. M. of that day, such summons being returnable on January 28th. Mr. Beard, after having been served for the 28th, came before the justice and consented, on the part of his company, to an immediate trial, which was had, and judgment rendered against the defendant for $180, the amount of the six coupons. Immediate execution was sworn out and placed in the hands of the

constable at 5 o'clock and four minutes in the afternoon of that day. The execution was afterwards returned as follows: "This execution returned. No property found; no part satisfied, this 27th day of March, 1895." (Rec., pp. 224-226.)

Later, on the same day, the trustees signed the paper writing already quoted (on page 5), declaring all the 1,000 bonds and interest thereon immediately due and payable for the default of the paper company in having failed to remove, discharge or pay the above execution.

Later, in the night of the same day and on the following day, January 23d, the trustees took possession of all the paper mills and contents included in the mortgage. (Rec., p. 235.)

On the part of plaintiffs the mortgage sought to be foreclosed having been introduced in evidence, it was proved that the 1000 bonds secured by such mortgage were in fact issued by the mortgagor and were certified by the Northern Trust Company, and by that company delivered to various persons upon the written orders of the mortgagor corporation; (Rec., pp. 280 to 294 incl.) and that 765 of the bonds in the aggregate were so delivered to some of the defendants in the cross-bill, who were therein charged with being in said combination, and a large number of the remaining bonds to the business associates of such defendants. It was also proved that shortly before the bill of complaint was filed, written requests were made upon respondents, as trustees in the mortgage, to proceed to foreclose that instrument. Those requests were signed by the holders of 366 of the bonds, of which all but 50 were owned by such defendants. Amongst

those owners was James Flanagan, whose judgment on the interest coupons is mentioned above.

Plaintiffs also introduced evidence tending to prove that the mortgagor corporation was insolvent.

None of the mortgage bonds or interest coupons were introduced in evidence; nor were any of them produced before the Master or the Court. No evidence was given that The Northern Trust Company had ever caused any of the bonds to be drawn by lot for redemption, or that any drawing had been made, as provided in the bonds and mortgage as the sole method for ascertaining the times when the bonds should respectively mature.

No evidence was offered that any written notice was ever given to the paper company by any holder or owner of bonds, that the latter had called in the principal of his bonds for the default in payment of the interest as provided in the bonds.

In short, the only evidence introduced or offered, tending to prove the happening of any of the conditions named in the bonds or mortgage for the maturity of the principal of any of the bonds, were the proceedings before the justice of the peace wherein James Flanagan obtained the judgment against the paper company.

EVIDENCE WAS ALSO HEARD BY THE MASTER, ESTABLISHING THE FOLLOWING FACTS ON THE PART OF THE PETITIONERS UNDER THEIR ANSWER;

In 1892 wrapping paper made from straw was an article of commerce and merchandise, used by grocers, butchers and bakers throughout the United States, and was manufactured under separate and distinct management by sixty-seven competing paper mills; fifty-six of which were first class and in daily operation; eleven were of small size and of little importance, while three additional were in process of construction. (Rec., p. 358.) These mills were all located in that part of the United States bounded on the east by Pittsburgh, Pennsylvania, and west by Lincoln, Nebraska, on the north by Minneapolis, Minnesota, and on the south by the Ohio River, being in the States of Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, Missouri, Nebraska and Kansas. (418-419.) The mills were located in these particular States because they constituted what was known as the straw producing region of the United States, outside of which no mill could exist in competition. (R., p. 359.)

In 1890 a syndicate was organized for the purpose of acquiring the straw paper mills in the United States, at that time about seventy in number, and to convey them to a corporation. Options were secured on all these mills, of which fifty-four then could have been acquired for $2,391,000 (R., p. 358) and the balance leased down, but, owing to the so-called Baring failure, the scheme was abandoned and the options lapsed. (R., p. 339.)

In February, 1892, this scheme was revived by one Emanuel Stein, of Chicago, who, to use his own language, became an agent or "conduit" (R., p. 318) through whom certain capitalists in New York, represented by one Samuel Untermyer, certain other capitalists,

in Buffalo, New York, represented by one Philo D. Beard, and certain other men of means in Chicago, represented by the firm of Dupee, Judah, Willard & Wolf, acted.

Stein, in February 1892, with one E. G. Church, sought out one John B. Sherwood, because the latter had been employed by the syndicate of 1890 to secure the options. (R., p. 339.) Mr. Church stated in Stein's presence, to Sherwood, that "Mr. Stein had said "if we could get these options again, we could secure "the money down in New York to form a corporation, "which would include all of these seventy paper mill plants." (R., p. 339.)

There was a second conference between Stein, Sherwood and Church, into which one Trebein and one Halliday were called at a meeting at the Wellington hotel. (R., p. 340), where Sherwood as a result of that meeting, made up a list of his options of 1890, showing seventy mills, also showing cost of manufacturing and selling price for the past ten years, which he turned over to Mr. Stein, and the same was taken by the latter to New York. (R., pp. 340, 368, 369, 370, 384, 385, 386, 393, 394, 400.) Preliminary conferences followed, and on the 16th day of June, 1891, Philo D. Baird of Buffalo appeared in the City of Chicago with the following letter of introduction from Samuel Untermyer of New York to Henry M. Wolf of Chicago. (R., 422.)

GUGGENHEIMER & UNTERMYER,
Attorneys and Solicitors at Law,
Bank of America Building, No. 46 Wall Street,
corner of William street. Up-town office, 906 and 908 Third avenue.

New York, June 13, 1892.

HENRY M. WOLF, ESQ.,
Care of DUPEE, JUDAH & WILLARD,
Adams Express building, Dearborn street,
Chicago, Ill.

MY DEAR MR. WOLF:

This will introduce to you Mr. Philo D. Beard, of Buffalo, who is about organizing a consolidation of the manufacturers of straw paper in the west, whom I commend to your favorable consideration. I have prepared certain options for Mr. Beard to be signed by the various manufacturers, and these options provide for a deposit of documents and securities by the various manufacturers. I have advised Mr. Beard to make the Trust Company in Chicago represented by your firm the depository of these papers, but I do not recollect at the moment the name of the company. Will you kindly confer with Mr. Beard on the subject and gave him such assistance as is in your power.

With kind regards, believe me,

Very truly yours,

SAMUEL UNTERMYER.

The trust company above referred to is the Northern Trust Company, one of the respondents. (R., 422.)

The option referred to by Mr. Untermyer will be found on page 503 of the record.

The party of the first part is the mill owner, the parties of the second part are Philo D. Beard and Thomas T. Ramsdell. Among other recitals [stated to be the consideration for the instrument] the option contains the following:

"Whereas, it is the purpose of the parties of the second "part to organize one or more corporations in such State "or States of the United States, as they may be advised, "with a capital of one million dollars in preferred stock, "entitled to a dividend of 8 per cent per annum, and "three million dollars of common stock, and with a total "bonded debt, secured by mortgage or trust deed, of one "million dollars." (R. 503.)

The fourth provision of the option provides for the purchase price at which the vendors will convey their mills together with good will, etc., to the corporation to be organized, agreeing to take part payment in preferred and common stock. (R. 504.)

The fifth contains a covenant that the corporation, so to be organized, shall have a capital of four million dollars, divided into one million dollars of preferred 8 per cent stock, and three million dollars of common stock, with power to issue bonds to the amount of one million dollars, the bonds to run not less than ten years. (R. 505.)

The eighth provision of the option is as follows:

"It is understood between the parties hereto that it is "the purpose of the parties of the second part, their nom- "inees or assigns, to procure options from certain persons "and firms and from other corporations engaged in the "manufacture of straw paper, with a view of transferring

"the options so to be obtained by them, or of accepting "such options and the properties referred to therein, and "subsequently transferring such properties, to the *corpoo-* "*ation to be organized pursuant to the terms of this agree-* "*ment.*" (R. 506.)

The other provisions of the option contracts are in harmony with the above section, in the proposition that the mills were to be transferred to the corporation to be organized only, and not to the parties of the second part, for a total sum equal to the aggregate amount named in the options themselves.

Beard and Ramsdell, the parties of the second part (after the options were obtained) without any consideration therefor transferred them to Stein, who thereupon notified the mill owners of his acceptance thereof.

The Master reports on page 268:

"I further find that the contention of the defendants that "the stock of the company which passed into the hands of "Emanuel Stein by virtue of his contract with the company "was not fully paid up stock, is not supported by the testi- "mony. But I do find and report that said stock was received "by said Stein from said company in fulfillment of his contract "with it as fully paid stock, and that as a matter of law any "question in regard to it between stockholders of the com- "pany cannot be inquired into in this proceeding."

The 9th exception to the Master's report (522) is as follows:

"For that the Master hath in and by his said report "certified that the said stock (referring to the entire issue "of stock of said company) was received by said Stein "from said company in fulfillment of his contract with it "as fully paid up stock. Whereas, said Master should have "reported that said Stein did not, as a matter of fact, re- "ceive the entire issue of the stock of said company in ful-

"fillment of his contract with said company; that $629,000 "of the preferred stock of said company and $1,258,000 of "the common stock of said company was issued direct to "the owners of the mills, according to the options, whereby "they agreed to transfer their said mills to said Stein, or a "corporation to be organized by him, and the balance of "the stock of the defendant company, namely, 3,710 "shares of preferred and 17,420 shares of common stock "were fraudulently and without consideration issued direct, "and not through the medium of said Stein, to the organ-"izers and promoters of said defendant company, and with-"out the knowledge and consent of these defendants who "took their stock in said company on the representations of "said Stein and the promoters and their agents, that 70 "mills would be acquired in exchange for the stock and "bonds of the defendant corporation, and that the purchase "price of said 70 mills would absorb and take up all said "capital stock of four million dollars; whereas, in fact, said "corporation only acquired 39 mills, as appears from the "testimony of Emanuel Stein, John B. Sherwood and Henry "M. Wolf.

The Circuit Judge, in deciding the case in the Circuit Court, in his opinion, on pages 525-526 said:

"It is strongly urged here that the property which the "company got for its stock under the Stein contract was "not a fair equivalent for the stock, estimating the latter at "its par value. As the case has turned out and in the light "of what has happened, this position is doubtless correct; "but when the contract was made, and in view of the enter-"prise then in contemplation, I am not even prepared to say "that the estimate put upon the property by these parties "was so far out of the way. The important point, as the "question arises here, is this: Whatever may have been in "fact the value of the property turned over to the company "for its stock, the company agreed to take it for the stock. "The persons interested were the stockholders and there "was no dissent on the part of any person concerned from "what was then done."

At the time the company made this agreement, as will hereafter appear from the evidence, it was in the hands and under the control of the promoters.

And the Circuit Court of Appeals in its opinion on page 575, said:

"Assuming that the stock of the company was of par "value, and that the plants were worth only the prices "fixed upon them in the several options, of course there "would appear to be an overvaluation in the sale. But this "is an assumption that would scarcely be warranted. "Probably there was not much market value for the stock "especially the common and unpreferred stock. It is sup- "posed that the new enterprise would make the plants "more valuable, so that the value of any plant before the "transfer would not be evidence of its value after the con- "solidation should be completed. Every one interested "proceeded with his eyes open, and it was entirely compe- "tent to make such contract as they might agree upon. "There was no compulsion practiced and no evidence of "fraud."

Between July 1 and October 31, 1892, the options on the mills were being secured (R 341). It was believed by the petitioners and other mill owners that options were being secured on the entire seventy mills (R., 368-367-371-400).

On page 368 Sherwood testifies: "Mr. Stein, Mr. "Church, Mr. Trebein, Mr. Halliday, and it is "my impression that in my conversation with Mr. "Beard and Mr. Ransdell, which I referred to in my di- "rect examination I spoke of, the subject of the 70 millls "was spoken of, in fact I feel very sure of it."

On page 370 Sherwood answered the following question put to him:

"Q. I will ask you again were any further statements

"made by these gentlemen, or either of them, to the effect "that all these 70 mills should be obtained by the corpora- "tion to be formed?"

"A. Yes, sir, all these gentlemen spoke in their con- "versation to me of 70 mills going in." * * * *

"They never said to me otherwise than that the 70 mills "were to go in, never suggested that any changes were to "be made, that any number of mills were to be left out, "but on the contrary, when we commenced taking options "about the first day of July, 1892, the territory was divided "up, Mr. Church was to take all west of the Indiana line "and to be assisted by Mr. Halliday and Mr. Stein if nec- "essary. I was to have Indiana and Michigan; Mr. Tre- "bein was to have Ohio and it was the understanding that "we should all assist one another in getting these options, "and as I have stated in my direct examination, I did so, "and the fact is I took an option on the Hartford City Mill "in Indiana, and Mr. Stein Mr. Church and Mr. Trebein "were also at that mill to change it, and I had every reason "to believe, and did believe, that the Hartford City Mill "was going in, especially as it was one of the very best mills "in the business, but they left that mill out. The same is "true of the Indiana Paper Company, of Mishawaka. I "took an option there for its product." (R., 370.)

On page 343 Sherwood says:

"In that talk I had with Mr. Wolf (on November 15, "1892) I told him about these seventy mills and told him "that I could not find out from Mr. Church what options he "had got in, or from Mr. Trebein, and he said they had got "in substantially all, but did not give me the number, and I

"never saw a full list of these mills that had been taken in "until this foreclosure suit was brought and I found it in the "bill."

There is no testimony in the record to show that petitioners knew that the entire seventy mills were not to be taken into the proposed corporation. Sherwood testified positively that they did not know that the entire seventy were not to go in, and on page 374 says:

"No, sir; and also the fact that Mr. Stein, Mr. Church, "Mr. Halliday and Mr. Trebein continually guarded me "against saying that (what) I knew to these men as to the "number that were going in, or anything about it, and the "fact that I believed myself seventy mills were going in "and took it for granted that nobody else had any other "information."

And on pages 369 and 370 he testified on cross-examination as follows:

"Mr. Stein took these statements, and said he would go "down and see Mr. Beard and Mr. Ramsdell, and all our "conversation was on the basis of the seventy mills, and in "addition to that I will say that at the time we finally agreed "on my receiving this $25,000 of common stock it was based "on all the seventy mills being in, for the reason I would "never have taken it if one-half of the mills were left out, "because the organization must be unsuccessful, not "having the others to act with them."

This testimony of Sherwood's is at no place in the record contradicted. As a matter of fact, the record does not show on how many of the seventy mills options were secured, but it does

show that they were secured on more than forty. No one testified on behalf of the promoters that options were not secured on the entire seventy mills. Thirty-nine of the mills on which options were secured, according to the consideration expressed in the options themselves, could be acquired for $2,788,000, payable in cash and bonds and notes of the corporation, as follows: $766,000 in cash, $629,000 in preferred stock, $1,258,000 in common stock and $135,000 in the notes of the company. (R., pp. 343-344.) When it was decided by the promoters to take in the thirty-nine mills, which could have been acquired, and which subsequently were acquired, for $2,788,000, payable as aforesaid, is not developed by the testimony.

As this plan only required $1,887,000 of stock to acquire thirty-nine mills it left a surplus of $2,113,000 of stock.

Stein testified, and he was no where contradicted, that, in the preliminary conferences, prior to the transfer of the mills, pursuant to the options, and before the corporation to be organized was organized, the promoters agreed that *they would put up $1,000,000 on* (R., p. 325.) *the bonds of the corporation* in order to make the cash payment to the mill owners according to the options, pay the $200,000 into the treasury of the company as a working capital, and further agreed amongst themselves as to how the $2,113,000 of stock should be issued and divided amongst themselves. (R., pp. 322 and 312.) This understanding he says was verbal, and that he, on the verbal statement that Mr. Untermyer, Mr. Beard and others would put up the money necessary to make the purchases, went ahead and accepted the options. (R., p. 313.) But he also says these gentlemen understood what the mills could be

acquired for, as they examined the options. (R., p. 313.)

The Circuit Court of Appeals in its opinion on page 573, says: "In disposing of the bonds it was found nec-"essary to give the purchaser of each $1,000 a bonus of $200 "in addition of the preferred stock, and $400 in the common "stock of the company."

There is no evidence in the record tending to show that the petitioners or mill owners or even the company knew of such an arrangement. There is nothing in the options themselves to authorize it, and it is exactly contrary to what Stein says was done as between the members of the syndicate themselves. What Stein and Wolf testified to was, that the members of the syndicate, in placing some of the bonds, gave to their friends and associates $200 of preferred and $400 of common stock with each bond. (R., 322 and 455.) They were not fair enough even to allow their friends to share on an equal basis with themselves in the preferred and common stock.

Assuming that the Circuit Court of Appeals is correct in its above statement, quoted from page 573 of the Record, and assuming that 3,330 shares were rightfully placed in Wolf's hands as trustee on the order of Stein under a modified agreement between him and the company, hereinafter referred to, there would be absorbed as bonus with the bonds 6000 shares, and 3,330 by Wolf as trustee, aggregating 9,330 shares. Adding to this 18,870 shares necessary to pay for the mills (Rec., p. 344), will absorb 28,200 shares of the 40,000 shares, total capitalization, and leave 11,800 shares, or $1,180,000 of stock, still unaccounted for, and against which no claim whatever can be set up by respondents; unless it is further assumed that possibly for services

in obtaining options and organizing the corporation Sherwood received $25,000 of stock. If Trebein and Church, on this account, received the same amount, it would aggregate $75,000. Assuming and adding $100,000 to pay for organizing, there is still over $1,000,000 of stock at its par value which the bondholders took without paying for in any way whatever.

To carry out the above plan of taking from the treasury of the contemplated company without formal subscription the $2,113,000 of stock, which was not necessary to be used in acquiring the mills; while Baird was transferring the options to Stein, Samuel Untermyer drafted the articles of incorporation under the laws of the State of New Jersey, which were executed by Baird, by Henry C. Taylor, a clerk in the office of Guggenheimer & Untermyer, and William C. Heppenheimer, a New York lawyer residing in New Jersey, each subscribing for four shares, aggregating twelve shares out of the total issue of 40,000 shares. On December 6th, 1892, these articles of incorporation were filed in the office of the Secretary of State in the State of New Jersey. These incorporators immediately, as the statutes of New Jersey require, (on filing the Articles of Incorporation), met in Hoboken as stockholders and elected themselves directors with the following named persons: Maurice Untermeyer, Moses Weinman, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim and Samuel H. Guggenheimer, of whom Maurice Untermyer and Moses Weinman were members of the firm of Guggenheimer & Untermyer, and William C. Taylor, J. C. Guggenheimer, T. L. Herman, Harry C. Manheim and Samuel H. Gug-

genheimer were clerks in the office of said Guggenheimer & Untermyer. (R. 356, 311 and 451.) Not a single owner of mills expecting to become a stockholder under the accepted options was at this time placed on the board, although representations had been made by the syndicate as early as October 17, 1892, (R. 363) that the individuals had been selected for the first board of directors, a majority of whom were to be mill owners. (R., p. 357.) At this meeting Philo D. Baird was elected President, and one Samuel H. Guggenheimer was elected Secretary of the company.

On the 14th day of December, 1892, Stein, who now held all the options for the benefit of the promoters, at their instance, made a proposition in writing to the above Board of Directors of the Columbia Straw Paper Company to transfer to it the mills named in the schedule attached thereto, thirty-nine in number, and to receive in payment therefor the entire capital stock, less the 12 shares issued to the incorporators, and the entire authorized issue of bonds of the corporation. This proposition was drafted by Samuel Untermyer (R., p. 308) and is found in the Record at page 401.) The stockholders on the same day, the 14th of December, met in Hoboken, New Jersey, and passed resolutions, set out in the mortgage, (Rec., p. 20) accepting Stein's proposition and instructing themselves, as directors, to buy the thirty-nine mills offered by Stein. On the same day, they, as directors of the company, met in the office of Guggenheimer & Untermyer, in their office in Wall street, New York, and by a resolution, a copy of which isset out in the mortgage sought to be foreclosed(Rec., p. 22), accepted the proposition as authorized by themselves as stockholders, and authorized Beard, as president, to enter into a contract with Stein.

On the following day, the 15th of December, 1892, the Columbia Straw Paper Company, by Philo D. Beard, its president, signed such a contract and sent it to Chicago, where, on the 17th day of December, 1892, it was by Emanuel Stein and wife, executed before a notary public, John B. Hood, a clerk in the office of Dupee, Judah, Willard & Wolf.

The first or "dummy" board of directors composed of Beard, members of, and clerks in the firm of Guggenheimer & Untermyer, served for two weeks, from the 14th day of December, 1892, when they were succeeded by the board composed of Philo D. Beard, Fred. C. Trebein, E. Gilbert Church, J. B. Halliday, B. M. Frees, Richard T. Higgins, Emanuel Stein, Augustus P. Brown and William C. Heppenheimer. (R. p. 357.)

From December 17th, 1892, to January 28th, 1893, Messrs. Dupee, Judah, Willard & Wolf were busy pursuading the mill owners to deposit their title deeds and abstracts with the Northern Trust Company, under the terms of section 10 of the option contract, before payment had been made for the deeds. But not a word during this time was said to the mill owners and these petitioners of what transpired in New York, December, 14th and 15th, 1892.

While the above transactions were progressing in Chicago under the immediate supervision of Mr. Wolf, who represented Untermyer and Dupee, Judah, Willard & Wolf and not Stein, (R., 305, 316, and 427). Mr. Untermyer was busily engaged in New York in getting his friends to advance to him and place in his hands the moneys to pay for the bonds that they had agreed to take, and Beard was likewise so engaged in Buffalo. The money being obtained

Untermyer arrived on the 25th day of January, 1893, in Chicago and deposited it, amounting, in all to over $800,000 in his name with the Northern Trust Company and arranged with that company as to the manner in which it was to be disbursed to the mill owners, the particulars of which the record does not fully disclose, except to show that it was arranged that all the money that he or any other subscriber to the bonds so deposited in his name should be checked out by his personal agent, Henry W. Wolf, who should sign all the checks. "Samuel Untermyer by H. M. Wolf, his attorney in fact." (R., 427). Between this 25th day of January, 1893 and the 8th day of April, 1893, Henry M. Wolf, acting for this syndicate, made settlement with all the mill owners and took over their properties (R., 429), by giving checks to them payable to Stein, who endorsed them over, endorsing as directed (R., 427.)

In no case was said Stein allowed to deposit any of these checks in bank, and give mill owners his individual check. Stein testified that he did not understand the plan of procedure, (Rec. 326 and 327) but left everything to Wolf to attend to, (Rec. 330) although it involved Stein's paying out $1,000,000 in cash, and distributing $4,000,000 of stock among his "nominees." Wolf's plan of settlement was as follows: He would first examine the options, (R., p. 425), find out how much money was required (R., p. 428) and then draw a check to make the cash payment and have Stein endorse the check (Rec. 319) and return same to Wolf, who would then deliver the check to the mill owner. The certificates of preferred and common stock were filled out under the directions of Wolf, (Rec. p. 429) in his office and given direct by Wolf to the mill owners. (Rec. pp. 429,

431). Stein had nothing to do with this part of the proceedings (Rec. 320) except to do as Wolf directed. Untermyer and Wolf did not seem to trust him, being determined to see to the disposition of the purchase price themselves. (Rec. p. 453). When it came to issuing the bonds, there was first a temporary bond certificate book, certifying that the holder of the certificate was entitled to bonds. The first certificate was drawn for one thousand bonds in the name of E. Stein. (Rec. pp. 432, 464) and was issued to him on the 28th day of January, 1893, (Rec. p. 465) and is in Samuel Untermyer's handwriting, (Rec. p. 466). Samuel Untermeyer then, on the same day, at the same time and at the same place, Richelieu Hotel, Chicago, had Stein endorse upon the back of this temporary certificate, calling for one thousand bonds when they should be lithographed and delivered, an order to the Columbia Straw Paper Company to have the certificate split up (Rec. p. 429) and new certificates for 1,000 bonds issued (Rec. p. 464) to the several parties and in the several amounts indicated as shown by schedule formerly attached thereto.

The petitioners asked repeatedly for the production of the record transfer of stock and the stubs from which the same were issued. (Rec., 338, 365 and 366.) These the respondents refused to produce, although it appeared these books were in the custody of the secretary of the defendant company in New York or New Jersey. (Rec., 321, 366, 409.) Thereupon, the petitioners proved by John B. Sherwood that he had secured a copy of the stock register from one of the directors of the company. (R., pp. 347–377–388.) From the information so derived Sherwood testified on

pages 344 and 345 of the Record that 957 shares of preferred and 4441 shares of common stock went directly into the hands of Philo D. Baird; that 859 of preferred stock and 4357 shares of common stock went to Messrs. Guggenheimer and Untermyer; to the frieuds of Messrs. Guggenheimer and Untermyer, 420 shares of preferred and 841 shares of common; to Dupee, Judah, Willard & Wolf, as a firm, 172 shares of preferred stock and 515 shares of common. To Henry M. Wolf, as trustee, 1,110 shares of preferred stock and 2,232 shares of common stock; to Emanuel Stein 270 shares of preferred and 2,377 shares of common, and that not a dollar of consideration passed from Stein or these parties to the company for this stock.

On pages 347 to 356, he shows how the bonds were distributed to these same parties and their associates. This information he derived from a copy of the bond register.

It appears from the testimony of Mr. Wolf that the 1,110 shares of preferred and 2,220 shares of the common stock which were placed in his hands as trustee, were so placed by Stein under a modified contract which the company entered into with Stein, dated January 28th, 1893, whereby the Newark and Coshocton Mills were turned over to the company. The contract is found in the Record at page 495. These 3,330 shares were so placed by Stein in Wolf's hands to indemnify certain of the syndicate, who loaned certain of their bonds to the company, and also the company from the liability which it incurred by execution of certain notes in order to secure possession of certain mills, the owners of which would not transfer their mills according to the options. This was done to avoid, as the agreement itself recites, litigation to secure possession

of these mills. This contract is found in the Record at page 495.

It thus appears that it can be traced directly that the syndicate got 3,788 shares of preferred, and 14,751 shares of common stock from the treasury of the company, aggregating 18,549 shares of the par value of $1,854,900. As it took but $1,887,000 of the stock at par to acquire the mills, this leaves $258,100 unaccounted for. This is explained in the testimony of Sherwood on page 344, when he says that this stock went to the friends of Dupee, Judah, Willard & Wolf. Add this $258,100, to the $1,854,900 above, and it amounts to $2,113,000 which is the total capitalization of $4,000,000, less the $1,887,000 that went to the mill owners.

These figures corroborate Stein's statement that the surplus stock was to go to the promoters and their friends, and hence we say the amounts the promoters took without any payment therefor was 21,130 shares of stock, of the par value of $2,113,000.

It no where appears that these defendants and cross-complainants knew anything of this modified contract (Rec., p. 495) and the distribution of the surplus stock, and, on the contrary, it was testified to by Sherwood that they knew nothing of this. Even Wolf says on page 456 he knew nothing about the distribution of the stock—that is, the surplus stock.

The Corporation Begins Business.

After commencing business, the first act of the directors was to increase the price of the products of the company from $24 a ton to $30 a ton (R. p. 360). This invited competition

from the mills on which options had been obtained but not "taken over" by the company. The Hartford City, Indiana mill mentioned by Sherwood above was especially active. (R., pp. 360 and 417.) Next Samuel Untermeyr drew articles of incorporation of the Paper Commission Company, under the laws of the State of New Jersey, with a share capital of $30,000 of common stock, divided into 600 shares of the par value of $50 each. Twenty shares were subscribed for by the incorporators, one Marchbank of New Jersey and two law clerks in the office of Guggenheimer & Untermyer, who had been members of the first Board of Directors of the Columbia Straw Paper Company. (R., 413.)

The sole function of this Paper Commission Company was to sell all the product of the Columbia Straw Paper Company and of those paper mills which had not been "taken over" by the Columbia Straw Paper Company as originally agreed in the options. (Rec., 415 to 418.) The syndicate composed of the original promotors, controlling the Columbia Company owned a majority of the stock of the Commission Company. And through the officers of the two companies, being the same and having the same office in the Old Colony building in the city of Chicago, full and absolute control was obtained by the Columbia Straw Paper Company of the product of *all* the paper mills in the country. The manager of the Hartford City, Indiana, mill, was one of the directors of the commission company. (R., p. 417.) On page 120 of the record it will be seen that the Columbia Straw Paper Company paid the Paper Commission Company the enormous commission of 25 per cent. of the gross selling price, for selling all its

paper, reducing the net price realized to the Columbia Straw Paper Company to a less amount than it had obtained when selling its own paper.

On the 10th day of January, 1896, after all the evidence had been taken, but before the Master had made his report, Charles A. Miller filed his petition setting out that he was a stockholder, and obtained his stock as part of the purchase price of his paper mill, sold to the syndicate mentioned above, and that the whole scheme of the promoters, as appeared from the recitals of the resolutions of the stockholders and directors set out in the mortgage, and from the evidence, was to establish a trust or unlawful combination in restraint of trade—and prayed that he might be made a party defendant to set up this defense. (Trans., p. 240.) The prayer of his petition was denied. (Trans., p. 264.)

On the 9th day of February, 1896, before the Master reported, but after the conclusion of the testimony, the petitioners asked leave to amend their answer for the purpose of showing that the scheme of the organizers of the Columbia Straw Paper Company, from the beginning, was to organize a trust or unlawful combination in restraint of trade contrary to the statutes of the State of Illinois and the Laws of the United States in such cases provided.

The court allowed the amendments tendered to be filed (Trans., p. 257), but on the 4th day of March, 1896, denied the motion to amend. (Trans., p. 264.)

It appears from the testimony that all the mills acquired had been taken over by the Columbia Straw Paper Company

by June 1, 1893, and on that day were in the full operation. The company promptly paid the semi-annual interest on the bonds, due on the first days of June and December, 1893. (R. 121 and 221.) Notwithstanding, the Court of Appeals say, in its opinion on page 573, "indeed, no portion, either of principal or "interest, has ever been paid."

From an exhibit to the verified cross-bill it appears on page 121, in a report of Beard, president, that the company expended $114,940.31 in cash on purchases of mills, in addition to the $5,000,000, for which Stein had agreed to transfer the mills to the company. On page 120 it is shown that the board of directors expended $90,368.08 for permanent improvements on the mill properties, and in addition thereto, expended $49.695 in carrying idle mill properties and (p. 119) $45,826.83 for repairs; making a grand total of $300,830.22 expended of the company's capital by the board of directors; with a full knowledge on the part of said board that the expending the sum that they did on Stein's debt, and permanent improvements, would prevent the board from meeting and paying the $30,000 of interest due on the first days of June and December, 1894 each.

The board of directors were all bond holders; Guggenheimer & Untermyer were the New York counsel, and Dupee, Judah, Willard & Wolf were the Chicago counsel at the time of the expenditure of these sums for Stein and for permanent improvements. Paragraph 7 of the cross-bill sets up the payment of the moneys for Stein. The default in the payment of the interest in June and December, 1894 was certainly unnecessary, and was perhaps intentional because, on foreclosure, the syndicate

would, by purchase through a re-organization committee, obtain the mills, valued according to the options at $2,788,000, and according to their own figures at over 5,000,000, in a condition better by over $90,000 permanent improvements and over $45,000 in repairs, than when they obtained their mortgage, and probably, if they so desired, even would cut out their friends.

Final and Complete "Wrecking" of the Columbia Straw Paper Company by, and to the Financial Advantage of, the Syndicate.

A reference to the condition of the bonds and mortgage will show that non-payment of interest at maturity is not of itself a ground for foreclosure. No foreclosure under this mortgage could be had without the principal of the bonds being due. The Paper Commission Company was a success. It was necessary that a plan be devised, for the Columbia Company was quickly bleeding to death, by which the bond holders could kill it at once and get possession and title to the mills. On reorganization, the bond holders, represented by a new company, could again coalesce with the outside mills in the Paper Commission Company. Some grounds for declaring the principal of the bonds due by the complainant trustees was necessary and the condition of the mortgage (not found in the condition of the bonds) (Article 3, Section 4, page 31) heretofore set out was taken advantage of. Although a bond holder cannot sue on an interest coupon, obtain judgment and levy his execution on the mortgaged property, yet the Northern Trust Company and Ovid B. Jameson, as trustees in the trust deed (representing in law the Columbia Company, as well as the bond

holders), Guggenheimer & Untermyer and Dupee. Judah, Willard & Wolf, planned and carried out the following scheme for declaring the principal of these bonds due, in order to bring about a foreclosure proceeding and a purchase of all the properties to themselves for the purposes above set out.

On January 24, 1895, a printed bill of complaint was filed in the Circuit Court in Chicago, which bill of complaint had been drawn in New York by Louis Marshall, of the firm of Guggenheimer, Untermyer & Marshall, the successor of the law firm of Guggenheimer & Untermyer, and New York counsel for the Columbia Straw Paper Company. Marshall swears positively to this fact in two several places of the record (the middle of page 562 and middle of page 566). Marshall also swears at pages 563 and 566 that he got his information about said judgment being taken, and upon which the trustees declared principal of bonds due, from Henry M. Wolf. In order for Marshall to draw the bill and get it filed by Wolf at Chicago on January 24, 1898, Wolf must have given the information by telegraph or long distance telephone, as Wolf could not have heard of the refusal of the company to forthwith pay the execution until the night of January 22, 1895, after 5:24 P. M., as he no longer was counsel for the Columbia Company, but was of the Northern Trust Company, trustee. The evidence does not show whether the bill was printed in New York or Chicago. A receiver was immediately appointed, and he entered into immediate possession of all the mills of the company in Illinois, and by ancillary proceedings, entered into immediate possession of all the mills in the several other States.

Errors Assigned.

First and Twentieth. The Circuit Court erred in striking from the files the cross-bill of the appellants and in refusing to vacate that order. (Rec., p. 545 and 549.)

Second. The court erred in overruling the exceptions and each of them of the petitioners Harry W. Dickerman, trustee, and others, to the Master's report, and in finding that the equities of the case are with the complainants. (Rec., p. 545.)

There are thirteen exceptions to the Master's report. In the sixth to the eighteenth assignments of error inclusive, the overruling of each exception is separately assigned as an error. (Rec., p. 549.)

The *first exception* is based on the failure to produce the bonds in evidence before the Master. (Rec., p. 508.)

The *second exception* is based on the failure of the testimony to show that the entire issue of bonds were duly certified by the Northern Trust Company. (Rec., p. 509.)

The *third exception* controverts the report of the Master that the Columbia Straw Paper Company made default, in redeeming and discharging 100 bonds which, by the terms of the bonds and the mortgage, were to be redeemed and paid on said day by paying therefor $110,000. That on the 1st day of December, 1894, it made default by failure to redeem or discharge the 105 or any part thereof as provided in the mortgage and bonds because the evidence does not show that there was any drawing of said bonds as provided by the fifth clause of conditions of the bonds themselves and because there was no demand by the Northern Trust Company three months prior to filing the bill on the Paper Company to pay said installments as provided in Art. 3, Sec. 2 of the mortgage. (Rec., p. 509.)

The *fourth exception* challenges the report of the Master that the defendant, the Columbia Straw Paper Company, failed to pay the interest on the first day of June, A. D. 1894, and the first day of December, A. D. 1894, on all of said 1000 bonds, and that said default still continues. (Rec., p. 511.)

The *fifth exception* is directed to the failure of the Master to certify that the evidence taken proved that the mortgage was executed and delivered and the 1,000 bonds secured thereby were uttered and issued by the Columbia Straw Paper Company as a material part of an unlawful scheme, for the purpose of creating a monopoly or trust. (Rec., p. 512.)

The *sixth exception* controverts the finding of the Master that the 1,000 bonds, with interest, at the date of his report were unpaid, based on the finding that the Columbia Straw Paper Company had failed to redeem or discharge certain of said bonds and had failed to pay certain moneys into the sinking fund, referred to in said mortgage, for the redemption of said bonds, because the evidence showed there had been no drawings of said bonds, according to the provisions of the mortgage by the trustees, and that until such drawing the defendant company was not in default for failure to redeem and pay such bonds. (Rec., p. 517.)

The *seventh exception* chalienges the correctness of the Master's report that the procurement, on the 22nd day of January, A. D. 1895, of the judgment by James Flanagan against the Columbia Straw Paper Company, before a justice of the peace, was not the result of collusion between the Columbia Straw Paper Company, the trustees and Flanagan. (Rec., p. 521.)

The *eighth and ninth exceptions* of challenge the report the Master that the contention of the defendant that the stock of the company, which passed into the hands of Emanuel Stein by virtue of his contract with the company, was not fully paid up stock, because 21,130 shares of the stock of the company was never in fact issued to Stein but went direct to the organizers and promoters, in pursuance of the agreement and understanding of Stein and the promoters prior to the organization of the defendant company, and without the knowledge and consent of the petitioners. (Rec., pp. 521, 522.)

The *tenth exception* challenges the correctness of the Master that as a matter of law no question can be raised in this proceeding between the stockholders and the com-

pany as to the issuance of the securities of the defendant company and that the defendant company should be permitted to off-set the indebtedness of the bondholders and their stock against the indebtedness of the company on the bonds. (Rec. p. 522.)

The *eleventh exception* controverts the finding of the Master that more than one-third of the owners of the bonds had requested the trustees to declare the principal of the 1,000 bonds due, and that the trustees so declared the principal due and that the trustees delivered or served such declaration of the principal and interest being due upon the Columbia Straw Paper Company. (Rec., p. 523.)

The *twelfth exception* goes to the report of the Master that the defendant company was and still is insolvent. (Rec., p. 523.)

The *thirteenth exception* controverts the finding of the Master that all of the issue of said 1,000 bonds was negotiated, sold and outstanding and valid obligations of the Columbia Straw Paper Company, instead of reporting that the bonds in the hands of the parties to whom they were issued were fraudulent and not valid obligations of the defendant, the Columbia Straw Paper Company. (Rec., p. 523.)

Third. The court erred in refusing to enlarge the powers of the receiver so as to authorize the receiver to take possession of the books, papers, records, documents and muniments of title of the defendant company. (Rec., p. 545.)

Fourth. The court erred in refusing to permit the appellants to amend their answer by the amendments tendered for the purpose of showing that the organization of the Columbia Straw Paper Company and the execution of the bonds and mortgage sought to be foreclosed was pursuant to a scheme for the purpose of organizing a trust contrary to the laws of Illinois and the statutes of the United States. (Rec., pp. 545-546.)

Fifth. The court erred in not dismissing the bill filed by the complainants, The Northern Trust Company and Ovid B. Jameson, praying for the foreclosure of the mortgage sought to be foreclosed in the cause, for the reason

that no default was shown which, by the provisions of the terms of the mortgage, would entitle the complainants to the foreclosure thereof. (Rec., p. 546.)

Nineteenth. The court erred in refusing to permit Charles A. Miller to become a party defendant and to plead, answer or demur to the original bill. (Rec., p. 549.)

Twenty-first. The court erred in entering the decree of foreclosure and sale. (Rec., p. 549.)

BRIEF.

I.

NONE OF THE BONDS OR INTEREST COUPONS WERE INTRODUCED IN EVIDENCE, NOR THEIR ABSENCE ACCOUNTED FOR; AND YET THE MASTER COMPUTED AND REPORTED THE INTEREST AND PRINCIPAL OF THE 1,000 BONDS, AND THE CIRCUIT COURT ENTERED JUDGMENT FOR THE AMOUNT AGAINST THE MORTGAGOR CORPORATION, AND A DECREE OF SALE OF THE MORTGAGED PROPERTY, WHICH DECREE WAS APPROVED BY THE CIRCUIT COURT OF APPEALS.

Respondents' evidence before Master. (Rec., pp. 217-239.)

Master's report. (Rec., pp. 265-269.)

First exception to Master's report. (Rec., pp. 508-509.)

Opinion of Circuit Court. (Rec., pp. 525-527.)

Decree. (Rec., pp. 528, 529, 530, 531 and 532.)

Opinion of Circuit Court of Appeal. (Rec., pp. 576-577.)

II.

THE OVERRULING OF THE FIRST EXCEPTION TO THE REPORT OF THE MASTER, AND THE ENTRY OF THE DECREE OF FORECLOSURE AND SALE WITHOUT THE INTRODUCTION OF THE BONDS AND INTEREST COUPONS IN EVIDENCE, CONSTITUTED ERROR FOR WHICH THE DECREE SHOULD BE REVERSED.

Guaranty Trust Co. vs. Green Cove R. R. Co., 139 U. S., p. 137.

Dowden vs. Wilson, 71 Ill., p. 485.

More vs. Titman, 35 Ill., p. 310.

Lucas vs. Harris, 20 Ill., p. 166.

George vs. Ludlow, 66 Mich., p. 176.

Biers vs. Hawley, 3 Conn., p. 110.

Field vs. Anderson, 55 Ark., p. 546.

Schumpert vs. Dillard, 55 Miss., pp. 348-363.

2 Jones on Mortgages, Sec. 1469.

III.

WHEN THE BILL OF COMPLAINT WAS FILED THE PRINCIPAL OF THE BONDS WAS NOT DUE, NOR WAS THE MORTGAGE ENFORCEABLE BY THE RESPECTIVE PROVISIONS OF THOSE INSTRUMENTS.

Provisions of Bond, Rec., p. 25-27.

Provisions of Mortgage, Rec., pp. 30, 31, 34.

IV.

THE DECLARATION OF THE TRUSTEES THAT PRINCIPAL AND INTEREST WERE DUE ON JANUARY 22, 1895, WAS THE DIRECT RESULT OF COLLUSION BETWEEN THE RESPONDENTS, THE MANAGING OFFICERS OF THE COLUMBIA STRAW PAPER COMPANY, AND THE SYNDICATE, TO BRING ABOUT THE FORECLOSURE; AND THE RESULT WAS THE FLANAGAN JUDGMENT.

Bondholder sent coupons from New York to Wolf (Ev. of Wolf, Rec., p. 483.)

Wolf gave them to Leffinwell, instructing instant suit. (Ev. of Leffingwell, Rec., p. 395.)

Suit, summons, trial, issue of execution inside of twenty-five minutes, on January 22nd, 1895, after five o'clock P. M.

Transcript of justice of the peace. (Rec., pp. 224-226.)

Declaration of trustees made same night. (Rec., p. 220.)

Mills taken possession of same night after declaration. (Ev. of Heurtley, Rec., p. 235.)

Number of conferences, before Flanagan suit, in regard to taking possession of mills by Northern Trust Company, trustee, between Mr. Smith, President of Northern Trust Company, trustee, and Mr. Jameson, the other trustee, who had been sent for, and Dupee, Judah, Willard & Wolf. (Ev. of Smith, Rec., pp. 272-274.)

Smith, the president, and Heurtley, the secretary of Northern Trust Company, both state ignorance of all details of Flanagan judgment, of declaration of principal, and interest of bonds due; of requests of bondholders, or that they are bondholders or signatures genuine. Everything left to their lawyers.

Ev. of Byron L. Smith, Pres't. (Rec., pp. 271, 272, 273, 274 and 275.)

Ev. of Heurtley, Sec'y. (Rec., pp. 222, 223, 224, 226, 229, 231, 233, 237, 238, 295, esp. 296.)

Notification by Wolf to Guggenheimer, Untermyer & Marshall in New York, and preparation of bill for foreclosure. (Rec., pp. 562, 563, 566.)

V.

THE ACTION OF THE TRUSTEES IN DECLARING THE PRINCIPAL OF THE BONDS AND THE INTEREST DUE, BECAUSE THE MORTGAGOR CORPORATION HAD NOT PAID THE EXECUTION ISSUED UNDER THE FLANAGAN JUDGMENT, WAS WRONGFUL AND CAN NOT BE SUSTAINED.

Union Mutual Life Ins. Co. vs. Union Mills Plaster Co., 37 Fed. Reps., 289.

Bennett vs. Lycoming, etc., Ins. Co., 67 N. Y., p. 274.

Anderson's Law Dict., Title "Forthwith."

2 Cook on Corporations, Sec. 772 (4th Ed.)

Pugh vs. Fairmount Mining Co., 112 U. S.

5 Thompson on Corporations, Sec. 6124.

VI.

THE BONDS OF THE COLUMBIA STRAW PAPER COMPANY SECURED BY THE MORTGAGE SOUGHT TO BE FORECLOSED, ALTHOUGH NEGOTIABLE IN FORM, HAD THEIR NEGOTIABILITY DESTROYED BY STIPULATIONS RENDERING THEIR PAYMENT SUBJECT TO CONTINGENCIES.

Jones on Corporate Bonds and Mortgages, Sec. 191.

Union Cattle Co. vs. International Trust Co., 149 Mass., p. 492.

McClelland vs. Norfolk R. R. Co., 110 N. Y., p. 476. 18 N. E. 238.

Evertson vs. National Bank of Newport, 66 N. Y., p. 14.

Crouch vs. Credit Faucier of England, L. R., 8; Q. B., p. 374.

VII.

THE PURPOSE AND OBJECT OF THE PROMOTERS WAS TO ORGANIZE AN UNLAWFUL COMBINATION IN RESTRAINT OF TRADE AND COMMERCE.—THE ORGANIZATION OF THE COLUMBIA STRAW PAPER COMPANY, THE EXECUTION AND DELIVERY OF THE BONDS AND MORTGAGE WERE ACTS IN PURSUANCE THEREOF AND THEREFORE BOTH ARE VOID.

Mortgage and form of bonds. (Rec., pp. 19-45.)

Letter of Untermyer. (Rec., p. 422.)

Record, pp. 368-400.

Fifth exception to Master's Rep. (Rec., pp. 512-517.)

Act of congress of July 2, 1890, Chap., 647, p. 209.

Anti-trust act of Illinois.

Starr & Curtis' Revised Statutes 1896, p. 1252.

Richardson vs. Buhl, 77 Mich., p. 632.

United States vs. Freight Assn., 166 U. S., p. 290.

The answer should have been amended and the prayer of the Miller petition granted.

Chicago, Milwaukee & St. P. R. R. Co. vs. Third National Bank of Chicago, 134 U. S., p. 276.

VIII.

THE COURT ERRED IN ENTERING THE ORDER STRIKING THE CROSS-BILL FROM THE FILES AFTER IT HAD BEEN ANSWERED AND REPLICATIONS FILED AND IN REFUSING TO VACATE THIS ORDER.

Cross-bill was filed under leave of court granted upon petition. (Rec., p. 85.)

Cross-bill. (Rec., pp. 99-116.)

Answer of Dupee *et al.* to cross-bill. (Rec., pp. 131-141.)

" " Emanuel Stein to cross-bill. (Rec., pp. 141-155.)

" " Columbia Straw Paper Company. (Rec., pp. 157-164.)

" " Northern Trust Company. (Rec., pp. 156-157.)

Order extending time for cross-defendants, Solomon Maux, James Flanagan, Randolph Guggenheimer, Samuel Untermyer, Maurice Untermyer and Moses Weiman to answer cross-bill. (Rec., p. 164.)

Replications to answers to cross-bill of Columbia Straw Paper Company, Northern Trust Company, Emanual Stein and Charles A. Dupee, *et al.* (Rec., pp. 164-168.)

Demurrer of Flanagan. (Rec., p. 170.)

Demurrer of Marx. (Rec., p. 171.)

Answer of Samuel Untermyer. (Rec., pp. 173-184.)

Joint and several answer to cross-bill of Randolph Guggenheimer and Isaac Untermyer. (Rec., pp. 185-194.)

Joint and several answer to cross-bill of Maurice Untermyer and Moses Weinman. (Rec., pp. 195-205.)

Answer of T. T. Ramsdell to cross-bill. (Rec., pp. 206-210.)

Replications to answer of Samuel Untermyer. (Rec., p. 211.)

Replication to answer of Maurice Untermyer. (Rec., p. 212.)

Replication to answer of Randolph Guggenheimer (Rec., p. 213.)

Replication to answer of Thomas T. Ramsdell. (Rec., p. 214.)

Order striking cross-bill from the files. (Rec., p. 256.)

Order denying the motion of petitioners to vacate the order striking the cross-bill from the files. (Rec., p. 265.)

After a bill is answered it can *only be disposed of* at *final hearing*.

Betts vs. Lewis, 19 Howard, p. 72.

Payne vs. Cowan, 1 Smed. & M., (Chan. Miss.), p. 35.

Glegg vs. Leigh, 4 Madd., p. 191.

Bronson vs. L. & M. R. R. Co., 2 Wall., p. 283.

Lantz vs. Gordon, 28 Fed. Rep., p. 264.

White vs. Bower, 48 Fed. Rep., p. 187.

N[illegible]n vs. Lee, 2 Black, pp. 499-509.

2 [illegible]niel's Chan. Practice, p. 1547.

[illegible]. R. Co. vs. Bradley, 10 Wall, p. 299.

Kingsbury vs. Buckner, 134 U. S., p. 650.

Jones vs. Smith, 14 Ill., p. 229.

Brandon vs. Prime, 14 Blatchf., p. 371.

Equity Rule 94.

Bayless vs. Ry. Co., 8 Bissell, p. 193.

Thomas vs. R. R. Co., 101 U. S., p. 71.
Thomas Trustee vs. Ry. Co., 109 U. S., p. 552.
Morawetz on Corp., Section 306.

IX.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT SUPPORT THE CONTENTION OF THE PETITIONERS THAT THE STOCK OF THE COMPANY WHICH PASSED INTO THE HANDS OF THE BONDHOLDERS BY VIRTUE OF THE CONTRACT WITH STEIN WAS NOT FULLY PAID UP BY STEIN, AND THAT THE LIABILITY ON SUCH STOCK SUBSCRIPTIONS CANNOT BE OFF-SET AGAINST THE LIABILITY OF THE COMPANY ON THE BONDS.

Master's report. (Rec., p. 268.)

Ninth exception. (Rec., p. 522.)

Opinion of Circuit Judge. (Rec., pp. 525-526.)

Record of Circuit Court of Appeals. (Rec., p. 575.)

Evidence, pp. 367-371-400.

Cost of thirty-nine mills, number acquired, $2,788,000. (Rec., pp. 343-344.)

Paid therefor $5,000,000. (Rec., pp. 309-401.)

Contrary to option contracts. (Rec., p. 503.)

Promoters agreed in advance how they would divide the surplus stock. (Rec., pp. 312-313-325.)

THE TRANSACTION WITH STEIN DID NOT AMOUNT TO A SALE.

Butler vs. Thompson, 92 U. S., p. 412.
Webster vs. Upton, 91 U. S., p. 65.

Thompson on Corp., Vol. 1, Secs. 456-457-458-460.
Story's Eq. Juris., pp. 1430-1445.
Lloyd vs. Preston, 146 U. S., 630.
Brewster vs. Hatch, 122 N. Y., 349.

The transaction between Stein, Untermyer and their associates and the corporation amounted to this: They subscribed for $2,113,000 of stock, but instead of paying therefor secured an agreement from the company that they would for $1,000,000 advanced be given fully paid up stock of $2,113,000 and a mortgage back on the property of the corporation for the money advanced, and consequently the bonds are void.

Morrow vs. Iron & Steel Co., 87 Tenn.
Sawyer vs. Hog, 17 Wall., p. 610.

EVERY SHAREHOLDER IN THE CORPORATION IS ENTITLED TO INSIST THAT EVERY OTHER SHAREHOLDER SHALL CONTRIBUTE HIS RATABLE PART OF THE COMPANY'S CAPITAL FOR THE COMMON BENEFIT.

Morawetz on Private Corporations, Sec. 270, 286 and 288.

Clark vs. Bever, 139 U. S., p. 96.

Set-off is enforceable in equity where there are mutual debits and mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow set-off.

Gray vs. Rollo, 18 Wall., p. 629.

Wanzer vs. Truly, 17 Howard, p. 584.

Story's Equitable Jurisprudence, Secs. 1430-1445, 3rd Ed.

Goodwin vs. Kency, 46 Conn., p. 563.

Points of Argument.

1. The court erred in rendering a final decree of foreclosure and sale, without the production in evidence of the bonds and coupons (p. 53 *post.*)

2. The court erred in rendering a final decree of foreclosure and sale based on the declaration of the trustees predicated solely on the Flanagan judgment, when the principal of the bonds was not due by the terms thereof or the mortgage. (p. 61 *post.*)

3. The court erred in holding the bonds to be negotiable. (p. 70 *post.*)

4. The court erred in refusing to allow the amendment to the answer, after evidence taken, setting up as a defense that the bonds were not enforcible, as disclosed by the evidence, because issued as a means of organizing a "trust" or unlawful combination in restraint of trade.

The court erred in not refusing to enter a decree of foreclosure and sale of its own motion, as soon as the "trust" feature appeared established by the evidence (p. 73 *post.*)

5. The court erred in entering an order to strike the cross-bill from the files, and in refusing to vacate said order, and to reinstate the cross-bill (p. 77 *post.*)

6. The court erred in holding that the evidence did not support the contention of the petitioners that there is a liability enforcible in this cause, on the bondholders holding stock, that is not paid for to the Columbia Straw Paper Company, amounting to $2,113,000, and which indebtedness of each bondholder should be set off against the indebtedness on each bond (p. 86 *post.*)

ARGUMENT.

I.

THE COURT ERRED IN RENDERING A FINAL DECREE OF FORECLOSURE AND SALE, WITHOUT THE PRODUCTION IN EVIDENCE OF THE BONDS AND COUPONS.

The mortgagor corporation, Columbia Straw Paper Company, was sole defendant.

Petitioners, as stockholders of defendant, were allowed to defend against the foreclosure because the bondholders were in control of the corporation, and the mortgagor was not making any defense. Petitioners, in their answer, while admitting that the bonds secured by the mortgage had been, in fact, executed by the mortgagor-corporation, expressly denied that such bonds were duly issued, negotiated and sold, or were outstanding and valid obligations of the defendant corporation.

The Master found and reported that all the bonds, 1,000 in number, were negotiated and sold, and were outstanding and valid obligations of defendant corporation, and that they were secured by the mortgage sought to be foreclosed. He further found and reported that there was interest due on the bonds and unpaid (whether evidenced by interest coupons or not, he did not report), to the amount of $249,632.86.

For such principal and interest ($1,249,632.86), he recommended the foreclosure of the mortgage and sale of the mortgaged premises.

The Circuit Court overruled the exceptions (1st and 2d, R., pp. 508-509) of petitioners taken to the report of

the Master in finding and reporting as above, and held (opinion of court, R., p. 526), that the production of the bonds and interest coupons, in evidence, was not necessary until *after* the sale of the mortgaged premises, when the distribution of the proceeds of sale was about to be made. (R., 527.)

That view was also taken by the Circuit Court of Appeals, which held (on the theory *ab inconvenienti*), that it would be impracticable to require all the evidence of mortgage indebtedness to be presented in cases like the one at bar, before entering the decree of foreclosure and sale. On page 577 of the Record, the court say:

> "In these cases where bonds issued by railroads or other large corporations on a large scale, and held in trust by trustees, but really owned by persons in many parts of the civilized world, it has not been the practice, nor would it be practicable to require the bonds to be produced before the court or Master before a decree *nisi* is entered. The practice has uniformly been to enter a decree of sale without the production of the bonds. Of course they cannot be paid or share in the proceeds of sale until brought into court for payment and cancellation. In many cases years elapse after a decree is entered before all the bonds are brought in, the money lying in the registry of the court awaiting their presentation for payment, and in some cases all the bonds are never produced or paid. If the rule required all the bonds to be produced before the court or Master before a decree for sale could be made, it would in many cases be a practical denial of justice. No such practice has ever obtained to our knowledge. The sale is made for the benefit of all properly concerned. The decree is not final as to the persons or debts entitled to share in the proceeds. When the time for distribution arrives any creditor may challenge the title of the claimant of any bond presented."

It was urged upon both lower courts, on behalf of petitioners, that, admitting there was evidence before the Master which *prima facie* made a case of a mortgage duly executed, and sufficient mortgage indebtedness outstanding, and other facts to justify a decree of *foreclosure*, yet there ought not to be a *final decree* of sale until the cause should be again referred to the Master to ascertain and report the amount of the bonds and coupons outstanding. That in order to make such finding, the Master must have before him competent, legal primary evidence of such mortgage indebtedness, viz., the bonds and interest warrants, with the evidence of their respective owners or holders, as to the circumstances under which they came into their ownership or custody. (See Rec., 381, ll. 7, 8, 9 and 10.)

Petitioners insisted upon such proof, not to delay mortgagees or to throw legal obstacles in their way, but for the purpose of showing upon such examination that the owners and holders of the bonds and interest warrants had come by the same as part of the wrongful scheme to defraud the mortgagor-corporation and petitioners and other honest stockholders.

Their counsel before both courts, as well as before the Master, cited numerous cases where it had been held that, before a decree of foreclosure *and sale* could be ordered (*i. e.*, a final decree), it was indispensable that *proof* should be made of the amount of the mortgage-debt, even (in some cases) where a default had been taken against the mortgagor.

Their contention before both courts and the Master, as well as here, was, that it was not a question of what would

be the more *convenient* practice, but of *substantive legal requirement;* that the mortgagor had a legal right, before its property should be sold to satisfy its mortgage indebtedness, to have that indebtedness judicially ascertained by legal proof.

Both the Circuit Court and the Circuit Court of Appeals seemed to regard the decree which was entered, as a decree *nisi*, and that the *final decree* would not come until the property should have been sold, its proceeds paid in and be ready for distribution amongst the mortgagee-bondholders; when the court should come to finally direct the disposition of the proceeds of sale.

But it was submitted for petitioners, that this very decree was *final* as to the mortgagor-corporation; that before its property should be sold, the amount of its indebtedness, under the mortgage, should be ascertained by legal methods; so that if it should elect, it might pay the very amount thereof and prevent a sale; or, if a sale should be made, the amount necessary to be produced on such sale should be judicially ascertained; because from such sale, the defendant corporation could redeem in twelve months, by paying the amount of the sale with interest.

Counsel for petitioners urged upon the lower courts, as well as upon the Master, that for the Circuit Court to order a sale of the mortgage-premises, before requiring legal evidence of the mortgage-debt, with the purpose, as announced in the opinion of the learned Circuit Court of Appeals, of afterward requiring such evidence when the proceeds of the sale of the property should be ready for distribution amongst the bondholders, would be to postpone an

indispensable legal requirement in disposing of the controversy between mortgagees and mortgagor, until it would be *too late* to afford the latter any redress, in case the Master and the Circuit Court had *estimated* or guessed the mortgage-debt at too great a sum.

Whatever may be the result of any subsequent controversy between the bond holders over the distribution of the proceeds of sale cannot concern the mortgagor, because it will not be a party to such controversy. Its indebtedness has been fixed; its property will have been sold to pay that indebtedness; and if, in the subsequent distribution of the proceeds of sale, it shall be found that the indebtedness was fixed at too great an amount, that discovery will come at too late a stage in the proceedings to give the mortgagor any relief.

That the above propositions are supported by the decisions, we refer the court to the following cases:

Dowden vs. Wilson, 71 Ill., pp. 485, 487-488.
Moore vs. Titman, 35 Ill., p. 310.
Lucas vs. Harris, 20 Ill., p. 166.
George, Admr., vs. Ludlow, 66 Mich., p. 176.
Biers vs. Hawley, 3 Conn., p. 110.
Field vs. Anderson, 55 Ark., p. 546.
Schumpert vs. Dillard, 55 Miss., pp. 348, 363.
2 Jones on Mort., Sec. 1469.
Shellaber vs. Robinson, 97 U. S., p. 68. (Trust deed in equity is a mortgage.)

The learned Circuit Court of Appeals, it is submitted, was in error in the construction it places on the cases of *Guarantee Trust Co. vs. Green Cove Springs and M. R. Co.* (139 U. S., p. 150), and *Toler vs. Railway Co.* (67 Fed., p. 168.)

In the former case in foreclosure proceedings the bill set up that $25,000 of bonds were outstanding and unpaid. One defense of the answer was that there were no bonds outstanding, and that complainants had no interest to maintain the suit. The case was referred to a Master, and $23,000 of bonds, upon notice, were filed with him, leaving $2,000 of bonds unaccounted for. At this point the court dismissed the bill, evidently on the theory that the bonds were invalid. On appeal, this court reversed the case. It seems that the appellants, representing the $23,000 of bonds only, asked this court, in case of reversal, to specifically direct the Circuit Court "at this stage of the case to "determine as a finality the amount, validity and ownership "of such bonds, or the number which were held *bona fide* "by the present holders."

This court refused this request, and from the opinion it was evidently on the ground that there appeared to be $2,000 of bonds still outstanding *and which had not yet been produced before the Master*, and that until these were produced, or their absence accounted for, no final decree of foreclosure and sale could be had. It directed the court below to proceed with the case, in conformity with its opinion, on all questions involved in the appeal, and recognizing what must finally take place, added at the close of the opinion:

> "Should the court proceed to a decree for foreclosure and sale, the holders of the bonds can be notified to appear and file them before the Master, and all questions connected with their amount and ownership can be settled upon a *final hearing*."

As the $23,000 of bonds had been already filed with the

Master, the opinion of the court referred to the $2,000 only that had not been presented; and the presence of which, or a satisfactory explanation of the absence of which, would justify a final decree of foreclosure and sale, and which would be rendered only *after and upon* a final hearing.

In this case it appears from the opinion on pages 576 and 577 that the Circuit Court of Appeals bases its opinion on the language used by LURTON, J., in *Toler vs. Ry. Co., supra.* We submit that that case has been thoroughly misunderstood in every particular, and that the whole force of that opinion is summed up in the statement that where a decree *nisi* is rendered on admissions as to ownership of coupons, and default, and amount of default in payment of interest, there is no reason for requiring the production of bonds. That upon such a decree, and the payment of the same into the registry to save a decree final, or one of foreclosure and sale, then the question of distribution of these moneys can be enquired into, as the decree *nisi* does not determine the particular person to whom the debts are due, and is not final "as to the persons or debts entitled to share in the proceeds." After such payment the mortgage-defendant would have no further interest in the distribution of these moneys.

The Toler case (later down on page 181, recognizing the rule laid down in Fosdick case, 106 U. S., p. 47, that no sale of mortgaged property can be had to pay overdue interest only, found under a decree *nisi*) proceeds further to say that if a decree *nisi* is not satisfied by payment, and it becomes necessary to render an absolute decree of foreclosure and sale of the property, then a hearing must be had before the Master on "all questions connected with the

"amount due each [bondholder], and of ownership of "bonds and coupons," *and for this express purpose* "*the "holders of bonds can then be required to produce their bonds "and coupons before a Master.*"

The Court of Appeals seems to think that this hearing was to be had *after* a sale of the property on final decree, and not that the final decree shall be based on such proceeding before the Master. Upon such sale, it is said in the Toler case that the purchase money will take the place of the trust share. "The distribution will be in satisfaction "*pro rata* of *all* the bonds, principal and interest." This can readily be done, because all those matters as to ownership of bonds and amounts due each bondholder has been fixed in the decree absolute of sale *before* sale. The mortgagor-company in this way will have had its day in court on every question in which it could have any possible interest. But in such proceeding as the Court of Appeals suggests, the mortgagor-company would not have had its day in court on any question whatever in which it might have any interest.

That the decree entered in this cause was a final hearing of this cause, consummated by a final decree, see:

Howell vs. Western R. R. Co., 94 U. S., 463, p. 466.
Forgay vs. Conrad, 6 How, p. 201.
Railway Co. vs. Sweeney, 23 Wall, p. 405.
Whiting vs. Bank, 13 Pet., p. 15.
Grant vs. Insurance Co., 106 U. S., p. 429.
R. R. Co. vs. Soutter, 2 Wall., p. 440.
Blossom vs. R. R. Co., 1 Wall., p. 655.
Hinckley vs. R. R. Co., 94 U. S., p. 467.

Ray vs. Law, 3 Cranch, p. 179.
Bronson vs. R. R. Co., 2 Black, p. 524.
R. R. Co. vs. Fosdick, 106 U. S., p. 47.
First National Bank vs. Shedd, 121 U. S. p. 74.
Bostwick vs. Brinkirhoff, 106 U. S. p. 3.
Stovall vs. Banks, 10 Wall., p. 583.

It is therefore respectfully submitted that this is the only case to be found in the books, of a decree for the foreclosure and sale of mortgaged premises being allowed to stand, where no evidence was introduced of the amount of the mortgage-debt outstanding by the production of the instruments representing the same, or their absence being accounted for, and where there was no waiver by the contract of the parties or by their stipulation in the pleadings.

II.

THE PRINCIPAL OF THE MORTGAGE INDEBTEDNESS WAS NOT DUE BY THE TERMS OF THE BONDS OR MORTGAGE: AND AS THE ONLY GROUND UPON WHICH THE TRUSTEES DECLARED THE PRINCIPAL OF THE BONDS TO BE DUE, WAS THE FAILURE TO PAY THE EXECUTION ISSUED UPON THE FLANAGAN JUDGMENT, THERE WAS NO RIGHT TO THE DECREE WHICH WAS ENTERED.

While the provisions of the bonds and the mortgage securing the same may not be unique in the financial world, they are, so far as we have been able to investigate, of such a character as have never hitherto been brought for adjudication before this court.

By those provisions there is no day fixed for the maturity of the bonds, except the stipulations which require The Northern Trust Company (designated as "the Illinois trustee"), to ascertain all drawings to be made in the month of November in each year in the city of Chicago, at a time and place to be designated by one week's previous notice given by advertisement in two daily newspapers, one published in the city of New York and the other published in the city of Chicago. And that immediately after every drawing the mortgagor should cause the numbers of the bonds drawn for redemption to be published in the same manner, and in the same cities, for two consecutive weeks. It is then provided, that "Every bond so drawn for redemption shall become redeemable and be redeemed by the company on the first day of December next succeeding such drawing, at the price of each bond (in addition to all accrued interest) of one thousand one hundred dollars ($1,100) in gold coin of the United States of the standard of weight and fineness." (Rec., p. 27.)

There is no evidence in this record that any such drawiug was ever made in any year, and the fact is, no drawing was made. The only promise of the mortgagor to pay the bonds was "and if when the principal moneys hereby secured shall, in accordance with the terms and subject to the conditions as to payment and otherwise hereinafter mentioned or referred to, become payable." (p. 25.)

The respondents seem to have been aware of such conditions of the bonds and mortgage when they made the declaration of January 22, 1895, because they proceeded wholly upon the default of the company in having failed to discharge or pay the execution issued under the judgment

by Flanagan, and in that declaration, based upon the above fact, they declared "the principal and all interest owing upon the 1,000 bonds named and described in said trust deed to be immediately payable." (Rec., p. 220.)

James Flanagan, the plaintiff in that suit, was a bondholder and a client of Guggenheimer, Untermyer & Marshall, eastern counsel of defendant company. He sent six of his forty coupons to Henry M. Wolf, of the law firm, who are respondent's solicitors. Mr. Wolf gave the coupons to an attorney, Mr. Leffingwell, with instructions to bring suit immediately. (pp. 395, 396.) This was done the same day, on January 22, 1895. Summons was issued returnable January 28, and served on Philo D. Beard, the president of the company, on the same day it was issued, at 5 o'clock P. M. On that same afternoon Mr. Beard appeared before the justice of the peace and waived service, (although he had already been served), and consented to an immediate trial, which resulted in a judgment for $180. (Rec., p. 224.) Execution being sworn out, it was issued and placed in the hands of the constable at 5 o'clock and twenty-four minutes *that evening*. (p. 225.) Later, on the same day, the trustees executed the written document declaring the principal of the million dollars due, *on no other ground than that the company had not paid the execution*; although, as shown by the execution itself, there was no demand made by the constable for payment, and later the execution was returned *nulla bona*. (p. 220.)

The trustees took possession of the property of the company in the vicinity of Chicago the same night of January 22, all after 5:24 o'clock, the officers or agents of the defendant company making no resistance. (p. 223.)

The president of the Northern Trust Company had been in consultation with the attorneys for the trustees about foreclosing the mortgage and taking possession of the property *for several days* prior to January 22. (p. 272.)

Mr. Jameson, the Indiana trustee residing in Indianapolis, had been called to Chicago before the 22nd of January so as to be conveniently at hand to unite in declaring the principal of the bonds due (p. 274). And in addition, it is the sworn testimony, in the proceeding in the court of New Jersey, of Louis Marshall, of the firm of Guggenheimer, Untermyer & Marshall, that the bill of foreclosure in the suit was prepared in their office by him. (Rec., pp. 562 and 566.)

If Mr. Beard, as the president of the company, and using its name, had an arrangement or understanding with any one to have the judgment entered when it was, that constituted collusion between him and such other person. Upon this point the Master reported that the evidence did not sustain the contention of the petitioners that there was collusion. Seventh Exception (R., p. 521.)

The Circuit Court could see nothing illegal or amounting to collusion in the sense of fraud in the procurement of the Flanagan judgment (Rec., p. 527). It is realized that the report of the Master upon the facts, and his conclusions therefrom are entitled to great weight, but in this part of the controversy there are no disputed questions of fact. The bondholders, or some of them, desired to bring about a declaration by the trustees of the immediate maturity of the principal and interest of the bonds, and to obtain possession of the mortgaged property, and ultimately a foreclosure and sale. (Rec., 229-231.) The mortgagor corporation, by its officers and attorneys, who

were acting in the same interest with the bondholders, desired the same thing. (Rec., 562, 563, 564-566.) If all the bondholders and officers of the mortgagor represented all the interests in the mortgagor's property there would be no cause of complaint (Rec., 375-377.) They represented the bonds and to a large amount the stock, but there were other stockholders not similarly situated. Therefore, the rights of those minority stockholders in the mortgagor-corporation and its property could not be sacrificed except in accordance with the contracts of the parties and in conformity to law. The contract, as contained in the bonds and mortgage, certainly did not mean a mere colorable case where an execution was procured by the bondholders and their trustees on the one hand, and the mortgagor on the other, to be issued for the purpose of creating the condition upon which the principal of the bonds and interest might be declared to be immediately due and payable. The provision in question was for the protection of the bondholders from having their security impaired through the default of their mortgagor. (Rec., 31, Art. 3, Sec. 4.)

In the first place, it would seem to strike the moral sense of a court of equity, as something extraordinary that a million dollars of mortgage indebtedness, none of which was due, should be declared to be immediately due and payable for the sole reason that the mortgagor had not paid an execution for the trifling sum of $180 which could not be levied on the mortgaged property. In the second place, it appears still more extraordinary when that execution was procured to be entered by one of those same bondholders upon the interest coupons belonging to his bonds, and under the direction of a firm of attorneys who had been act-

ing almost, up to that time, as attorneys for the mortgagor, corporation. And in the third place, that the mortgagor, corporation, having five days in which to answer, had waived the time by the president himself appearing before the justice of the peace where the case was pending, on the same day on which service had been made upon him, and consenting to go to immediate trial without offering any evidence on behalf of his company. And lastly, that on the evening of the same day, without any demand having been made upon the defendant corporation, the trustees in the mortgage later than five o'clock and twenty-four minutes P. M. had made the declaration.

If the execution sued out on this judgment could not be levied upon the mortgaged property, it was of no force and effect, and therefore not a cause for declaring the principal of the bonds due under the paragraph just mentioned. All the property of the company was covered by the mortgage. That the constable could not have levied the execution upon the mortgaged premises is clear from the authorities.

In 2d Cook on Corporations, Sec. 772 (4th Ed.) the author says:

> "A coupon-holder may sue at law on an overdue coupon, but it is well settled law that neither a mortgage bondholder, nor the holder of a coupon can levy an execution upon the mortgaged property in order to enforce a judgment obtained upon the bond or coupon. There are two reasons for this rule: First, that a mortgagee at common law can not so enforce his security; second, other bondholders and coupon holders are entitled to participate equally in the security."

Also *Pugh vs. Fairmont Mining Co.*, 112 U. S., p. 238.

Also Thompson on Law of Corporations, Vol. 5, Sec. 6124.

Was the defendant company in default in not paying this execution for $180 during the 22d day of January, 1895, when the judgment was rendered at 5 o'clock and twenty-four minutes on the evening of that day, and no demand had been made upon the company for its payment; no evidence appearing in the record that the company had any knowledge that the execution was sued out? The provision in paragraph 4 of the 3d article of the mortgage, is that the company is only to be placed in default when it shall not discharge *forthwith* upon such execution being levi ed,etc. What is the term "forthwith" to be held to mean here? Certainly it should be construed so as to give it a reasonable interpretation under all the provisions of the mortgage and bonds and the circumstances of the case.

The statutes of Illinois provide that no execution shall be issued by a justice of the peace until after the expiration of twenty days from the date of the judgment, unless the party applying for the execution shall make oath that he believes the debt will be lost unless execution be issued forthwith, when it may issue immediately; but that no sale under any such execution shall take place within twenty days from the date of the judgment, nor that the issue of such execution shall deprive either party of the right to appeal. The defendant company here had twenty days in which to either pay, or appeal from, the judgment. The question, then, is, as to whether a reasonable time for the company, either to appeal from the judg-

ment or pay it, would not have been at least until business hours on the following day, under penalty of having a million dollars of its mortgage bonds declared to be immediately due and payable and its property taken out of its possession. The statement of the proposition ought to carry with it the answer.

In the case of *Bennett vs. Lycoming, etc., Ins. Co.*, 67 N. Y., p. 274, the insurance company defended the case on the ground that the policy contained a provision that the insured should "*forthwith*" give notice of the fire and loss to the secretary of the company, and within thirty days after the loss deliver to him a particular account of the loss. The company claimed that the plaintiffs were not entitled to recover because they had not given notice to the secretary until twenty-six days after the fire. The Court of Appeals held that this was within a reasonable time, and say on pages 276-277:

> "This notice was given on the 26th day after the fire; and the question was, whether under all the circumstances, it was given 'forthwith' within the meaning of the policy. The word 'forthwith' does not here mean immediately or instantaneously after the fire. It means, and has been held to mean, within a reasonable time or with reasonable diligence after the fire. (*N. Y. Cen. Ins. Co. vs. Nat. Protection Ins. Co.*, 20 Barb., p. 468; *Inman vs. Western Fire Ins. Co.*, 12 Wend., p. 425.) *What is a reasonable time depends upon all the circumstances of the case.*" (See also *Moffat vs. Dixon*, 3 Col., p. 314.)

In Anderson's Law Dictionary the definition given to the term "forthwith" is: "Has a relative meaning and will imply a longer or shorter period, according to the nature of the thing to be done."

The trustees could not take advantage of the failure of the mortgagor to pay this execution, as the procurement of the entry of that judgment and the issue of the execution thereunder were acts procured to be done by themselves, or by their attorneys acting for them, which is the same thing. Under the provision of the mortgage in question, if the mortgagor was in default in the eye of a court of equity, then that default is clearly one brought about by the respondents themselves; and if the principle involved in the old legal maxim, that no one shall take advantage of his own wrong, applies to the conduct of the trustees here, their action in declaring the bonds to be immediately due and payable, and in bringing this bill for foreclosure, will not be allowed to stand.

In the case of the *Union Mutual Life Insurance Company vs. The Union Mills Plaster Company, et al.*, 37 Fed. Rep., at page 289, the court say:

> "That it is competent for parties to stipulate that on default in the payment of an installment the whole may become due at the election of the parties, is well established, and courts of equity will give such stipulations effect when they have been fairly made and the right of election fairly exercised. (*Noonan vs. Lee*, 2 Black, p. 499; *Olcott vs. Bynum*, 17 Wall., p. 62.) It will not, however, aid in the enforcement of such right where the conduct of the payee indicates artfulness, trickery or stratagem in bringing on the technical conditions upon which he exercised his right; his purpose must have been open and honest, and advantage can not be taken of any misleading produced by his own action, or (what is the same thing) the reasonable implication contained in it. *Noyes vs. Clark*, 7 Paige, p. 170; *Broderick vs. Smith*, 26 Barb., p. 539."

III.

THE BONDS OF THE COLUMBIA STRAW PAPER COMPANY SECURED BY THE MORTGAGE SOUGHT TO FORECLOSED, ALTHOUGH NEGOTIABLE IN FORM, HAD THEIR NEGOTIABILITY DETROYED BY STIPULATIONS RENDERING THEIR PAYMENT SUBJECT TO CONTINGENCIES.

The bonds were not produced at the hearing either before the Master or the court below, and therefore this court have to depend upon the blank form of bonds set out in the copy of the mortgage attached to and made part of the bill, from which it appears that the bonds "are to be *substantially* in the following 'form.'"

The Record is absolutely silent as to whether the bonds issued, were substantially in this form, or in a form entirely different.

1. The bonds do not contain any agreement to pay one thousand dollars *absolutely* and at all events.

2. They do not contain any agreement to pay one thousand dollars at a specified time, or at a time that can be exactly ascertained.

3. The payment of the one thousand dollars is dependent upon conditions endorsed thereon, and among the conditions thus endorsed thereon is condition 5, that it will redeem certain bonds. This redemption is further subject to the condition that drawings are to be had under the direction of the Northern Trust Company, to *ascertain the particular* bonds to be redeemed. Without the Northern Trust Company directs the drawing there can be no redemption or repayment.

4. The redemption is to be made out of a special fund, known as the "sinking fund," and not payable generally from the funds of the company.

5. The heading of the bond "due on or before December 1, 1901," is not part of the bond proper, and is not a promise to pay at that time; and further, is not true when read with the agreements in the bond and conditions endorsed thereon.

In Jones on Corporate Bonds and Mortgages, Sec. 191, the author states the essentials of negotiability in corporate bonds. They must be payable to a person, order or bearer. The sum payable must be certain. *The time of payment must be capable of exact ascertainment.*

These bonds contain no agreement to pay at a definite time, nor can the time of payment be exactly ascertained, for the condition of redemption or repayment depends on the action of the Illinois trustee (Northern Trust Company) in first ascertaining by drawing what bonds are redeemable, and this action may never be taken, *and up to the present time has not been taken.*

This case differs from that of the *Union Cattle Co. vs. International Trust Co.*, 149 Mass., p. 492. In that case, under the Massachusetts statute, it was held that the bonds were negotiable although they were made payable out of the sinking fund. There, however, it appeared that the bonds were payable to bearer at a definite time, viz., November 1, 1896. In this case there is no such agreement.

It is held in *McClelland vs. Norfolk R. R. Co.*, 110 N. Y., p. 476 (18th N. E. Rep., p. 238), that in determining the "negotiability" of the instrument, the court is required to examine the bonds and mortgage both, and in that case it was held that the instruments were not negotiable on account of the condition set forth in the mortgage.

It will be found that in the bond under consideration in condition 9, that there is an attempt at an agreement to consider the bonds negotiable as they are to be held "free from any equities between the company and the original or any intermediate holder, etc." In the McClelland case there was a clause of this kind "this bond shall pass by delivery." Again, upon the assumption that this condition is part and parcel of the bond, we find that in the case of *Evertson vs. National Bank of Newport*, 66 N. Y., p. 14; S. C. in 23 Amer. Rep., p. 9, in the latter volume on page 13 that the court cites *Crouch vs. Credit Foncier of England*, L. R., p. 8; Q. B., p. 374, on this proposition:

> "Whether the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable paper, when it is not in terms within a class of instruments known to the law as negotiable, may be questioned."

In the case under consideration it is the claim of the appellants that all the bondholders are the original bondholders who received the $2,113,000 of the stock of the company as fully paid without making any payment therefor, and hence the above may have no application unless it should be claimed that some of the bondholders are purchasers in good faith, and for a valuable consideration of the bonds secured by the mortgage sought to be foreclosed in this case, in which case they will hold the bonds subject to any equities the company may have. But there is no evidence in the record of any such transfer. The evidence is otherwise.

IV.

THE CIRCUIT COURT SHOULD HAVE ALLOWED THE ANSWER TO HAVE BEEN AMENDED FOR THE PURPOSE OF SHOWING THAT THE ORGANIZATION OF THE DEFENDANT COMPANY AND THE EXECUTION OF THE BONDS AND MORTGAGE WERE PARTS OF A SCHEME TO FORM A "TRUST," OR UNLAWFUL COMBINATION IN RESTRAINT OF TRADE AND SHOULD HAVE GRANTED THE PRAYER OF THE PETITION OF MILLER.

The purpose of the amendment proposed was to enable the petitioner-stockholders to avail themselves and the company of this defense at the hearing.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Third National Bank of Chicago, 134 U. S., p. 276, was submitted as an authority for this practice.

Not only was this trust or combination in contravention of the act of Congress of July 2, 1890, Chap. 647, p. 209, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," but also in contravention of the anti-trust act of the State of Illinois. The first and fifth sections of the Illinois act are as as follows (Starr & Curtis' Revised Annotated Statutes of 1896, p. 1252):

> "If any corporation organized under the laws of this or any other State or county, for transacting or conducting any kind of business, in this State, or any partnership or individual or other association of persons whosoever, shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of merchandise, or commodity, or

shall enter into, become member of, or a party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State, such corporation partnership, or individual or other association of persons, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in this Act.

"Any contract or agreement in violation of any provision of the preceeding sections of this Act shall be absolutely void."

The attention of both courts at the hearing was brought to this question by the 5th exception to the Master's report. (Trans., pp. 512-517.)

Indeed, the court should of its own motion, it appearing that the mortgage was executed in furtherance of the scheme to form a trust, have dismissed the proceedings to foreclose.

When a contract regarding a kindred trust, Diamond Match Company, was before the Supreme Court of Michigan, and reported as *Richardson vs. Buhl* in 77 Mich., p. 632, SHERWOOD, C. J., used the following language (page 656):

"But an examination of the Record, and the character of the transactions out of which the contract grew, and the object intended to be accomplished by it, as I have found them, raise another, and far more important, question, *and which it becomes the imperative duty of this court to pass upon, whether raised by counsel or not.*

"When a contract is brought before us for construction and adjudication its validity is necessarily involved, and it is usually the first point to which the attention of the court is challenged by counsel, but in this case,

where, upon the argument, attention was called to this feature of the case, it was allowed to pass by counsel upon both sides without discussion.

"I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question."

The letter of Untermeyer at the inception of the negotiations shows the purpose and object of the parties. The options were for the same purpose and object.

The recitals of the resolutions of the stockholders and of the directors of the defendant company authorizing the corporation to make the trade with Stein embodied in the copy of the trust deed exhibited with the original bill, the answers of the defendants to the cross-bill and the testimony taken, establish that it at least was the intention to form a trust or unlawful combination.

In the case of *United States vs. Freight Association*, 166 U. S., 290, on page 319, in speaking of the Act of Congress of July 2, 1890, this court say:

"It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the State governments to successfully cope with them because of their commercial character and of their business ex-

tension through the different states of the union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust, and many others; and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to keep up their prices to a reasonable sum for the transportation of persons and property."

Again, on page 342:

"For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. *The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.*"

V.

THE COURT ERRED IN ENTERING AN ORDER TO STRIKE THE CROSS-BILL FROM THE FILES; AND IN REFUSING TO VACATE THIS ORDER AND TO REINSTATE THE CROSS-BILL.

The cross-bill was filed under leave of court granted upon a petition (Rec., p. 85) prepared according to the 94th equity rule. It will be found on page 100 of the record. It was not filed as a defense, or for discovery; but to obtain on behalf of the original defendant-mortgagor, The Columbia Straw Paper Company, the affirmative relief prayed for therein, which could not be obtained by an answer in equity.

It asked affirmative relief, not for violation of any personal equitable rights of your petitioners (as was the case of *Forbes vs. R. R. Co.*, 2 Woods, p. 323, Fed. Cases No. 4926, cited as authority by the Circuit Court of Appeals, p. 579), but for and in behalf of the defendant company, mortgagor, whose board of directers was under the control of the bondholders, represented by the respondent trustees, and which company had filed an answer denying nothing in the bill.

The court below, as stated in its opinion, bases its action in sustaining the Circuit Court in striking the cross-bills from the files on the following propositions:

(*a*) That your petitioners were defendants only by the permission and order of court. (Rec., p. 578.)

(*b*) That the matters set up in the cross bill were substantially those set up in the answer, and, therefore, there was no need of a cross-bill. (Rec., p. 578.)

(*c*) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion. (Rec., p. 579.)

(*d*) That matters in cross-bill were not germane to matters in original bill. (Rec., p. 580.)

We first submit that, no matter under what circumstances a cross-bill is allowed to be filed in a cause, if once filed, an answer filed to it, as here, then the cross-defendant having answered, has waived whatever right he may have had to move to strike it from the files. *A fortiori*, where replication is filed, and the cause at issue.

Payne vs. Cowan, 1 Smed. & M. Chan. (Miss.), p. 35.
Glegg vs. Leigh, 4 Madd., p. 191.
Betts vs. Lewis, 19 How, p. 72.

(*a*) That your petitioners were made defendants only by permission of the court, and the cross-bill was filed under leave.

The court below justifies its action in sustaining the Circuit Court in dismissing the cross-bill on the decision in *Forbes vs. Railroad Co.*, 2 Woods, p. 323, Fed. Cas., 4926.

But there is a wide distinction between these cases. In the Forbes case, the defendants filing cross-bills were seeking affirmative relief on behalf of their own private interests and not on behalf of the corporation. It was their individual equitable rights, and not those of the corporation, which were claimed to be invaded. The motion to dismiss went to the action of the court in allowing them to be made parties at all. In this cause, the matters set up in the peti-

tion and alleged in the cross-bill, which was verified by oath, were set up under the provisions of Equity Rule 94. The cross-bill is "founded on a right which may properly be asserted by the corporation." The averments of the cross-bill, with reference to the refusal of the company to assert its rights, were material averments. If insufficient in equity, the question could be raised by demurrer and not by motion to dismiss. When answers were filed, a hearing was the only method of ascertaining their truth. By peremptorily dismissing the cross-bill, as the court did, the corporation has been caused to lose all equitable rights it may have on behalf of its innocent and minority stockholders, which was being urged by this cross-bill against the bondholders represented by the trustees. As is said in *Bronson vs. L. & M. R. R. Co.*, 2 Wall., p. 283, which was decided prior to the promulgation of Rule 94 in Equity:

> "It would be a reproach to the law, and especially in a court of equity, if the stockholders were remediless."

Another distinction between this cause and the Forbes case, *supra*, is that in that case the intervenors having made a *prima facie* case, an order, without notice however to the parties to the suit, was entered allowing the intervenors to become parties with leave to answer and file a cross-bill, "As soon, says Mr. Justice Bradley, at page 327, as the "counsel for the complainants and the receiver were informed "of the order for leave to intervene, they applied for a rule "to show cause why said orders should not be vacated and set "aside; and a rule to show such cause was entered ac-"cordingly." He vacated the order to intervene and defend but, expressly did so because there was

much doubt whether the defendants were *bona fide* stockholders; that their contention was in behalf of their individual interests, and were *in opposition* to the interests of the company, and because they admitted the truth of all the charges of gross fraud on the part of the board of directors of the company *of whom they were a part.*

In this case there is no dispute as to your petitioners being *bona fide* stockholders, nor of their asserting rights on behalf of the company, which is expressly stated to be under the control of the bondholders. Further, in this case a cross-bill has been filed. In this case the order allowing the intervention is not attacked, but allowed to stand, and the answer of the intervenors is allowed to remain in and a hearing has been had and decree rendered on the same. Your petitioners are held rightly to be in court, and their answer recognized; but they are deprived of the benefit of their cross-bill on grounds which could only apply to vacating the order allowing them to intervene.

(*b*) That the matters set up in the cross-bill were substantially those set up in the answer, and, therefore, there was no need of a cross-bill.

We submit that the court below in its decision has failed to recognize that in equity a cross-bill may serve for two very different purposes. Affirmative relief in equity is not granted on an answer. It is granted only on a cross-bill. A cross-bill may be used for *defense* merely, or it may be used to obtain *affirmative relief.* In *Lautz vs. Gordon*, 28 Fed., p. 264, the court recognized this distinction by point-

ing out that, when used as a defense, it may set up a legal as well as an equitable defense, whereas, when used to obtain affirmative relief, it must set up facts calling for *equitable relief only*. In the latter case "the cross-bill is of the nature of an original bill seeking further aid from the court."

We believe the court below to be in error in stating that the answer and cross-bill set up substantially the same facts. The cross-bill contains additional facts to those set up in the answer.

The court is also in error, in stating as applied to this cause, that upon the filing of two answers setting up the same matter, one would be struck out on motion, and that the labeling of one of them as a cross-bill would not change the rule (Rec., p. 580.) The sentence does not express the true statement of facts here. It would be better expressed by saying if two pleadings are filed containing the same matter, and in one of which it clearly appeared that it was filed as a defense to the bill, and in bar of the suit; and in the other it clearly appeared that it was filed for the purpose of obtaining *equitable affirmative* relief; the former would be allowed to stand as an answer, the latter, as a cross-bill.

The cross-bill in this cause set up facts, and on those facts asked for an accounting in equity between the defendant company and the bondholders, represented by the respondents, on account of transactions between them and the company at the time of, and in connection with, the execution of the bond and mortgage and issue of capital stock. Under the answer, this equitable affirmative relief could not be granted.

Under Equity Rule 90, affirmative relief must be sought by cross-bill, as in the English High Court of Chancery.

White vs. Bower, 48 Fed., p. 187, citing

Noonan vs. Lee, 2 Black. pp. 499-509; 2 Dan'l Chancery Prac., 1547; *R. R. Co. vs. Bradley*, 10 Wall., p. 299.

In *Kingsbury vs. Buckner*, 134 U. S., p. 650, a quotation is made from *Jones vs. Smith*, 14 Ill., p. 229:

> "No fitter case could be imagined for a cross-bill than the one which is presented by these pleadings. No doubt upon his answer, he (defendant) was at liberty to prove the facts averred, but this would only defeat Smith's (the plaintiff's) claim for relief; while the *same facts, if established upon a cross-bill*, would entitle him to have satisfaction of the judgment actually entered."

(*c*) That the rule regarding the filing of cross-bills by permission is different from the rule in regard to filing original bills, which can not be dismissed on motion.

We respectfully submit to this honorable court that there is no logic or reason why the rule should be different. A cross-bill is in substance an original bill filed by the defendant in the cause to obtain affirmative relief, *and also to bring before the court, completely, "the whole matter in dispute."* Dan'l Chancery Pr., *1548. (6th Am. Ed.)

Brandon Mfg. Co. vs. Prime, 14 Blatchf., 371.

If the permission is once given by the court to be made a defendant in the cause, it follows by all the rules of logic and reason that he should be allowed, as a defendant, to assert all his equitable rights, and to obtain all his equitable remedies. On what ground can he be considered in court

to file an answer, but out of court when he attempts to file a cross-bill? The case of *Forbes vs. R. R. Co., supra*, quoted from by the court below, does not hold any such doctrine. The court did not there enunciate the unheard-of rule of practice in equity, that the court would allow the petitioner to become a defendant, recognize him as such, allow his answer to stand, and refuse to strike it out as the court below did in this case (Rec., p. 265), but dismiss the cross-bill for no other reason than that the rule is different as to original and cross-bills.

We submit that the rule is not different. That when a stranger to the original suit is once allowed to become a defendant, and files a cross-bill for affirmative equitable relief; then the rule is that his cross-bill must be tested by demurrer, or, if answered, shall go to a hearing; and that there is no more reason why a cross-bill should be dismissed than should an original bill.

(*d*) That matters in cross-bill were not germane to the original bill.

Webster defines "germane" to literally mean—near akin; and as a derivative meaning—closely allied—appropriate or fitting—relevant.

The court below says that the original bill is simply to foreclose a mortgage, and therefore the cross-bill is not germane. But this was the *object* only of the bill. The cross-bill was germane to the *subject*-matter of the original bill, which is the execution of the mortgage and bonds for the purchase-money of the milling plants, the validity of the same, *the indebtedness of the company to each holder of the bonds*, and the non-pay-

ment of said indebtedness and the resulting right of foreclosure. The cross-bill sets up an equitable set-off against each holder of the bonds, and asks for an accounting. The case of the *Investment Corp. vs. Marquan*, 62 Fed., p. 960, cited by the court below, does not apply, because in that case the alleged cross-bill was filed *for defense merely*, and in no sense asked for either discovery or affirmative relief; and in fact was not a cross-bill and, not being such, was dismissed.

But on the question of whether the cross-bill was germane or not to the original bill, we submit that it could not be dismissed. On that point it could only be struck down by a demurrer, or fail on the hearing.

Admitting, *arguendo*, that the Circuit Court could dismiss the cross-bill, without demurrer filed, or allowing it to go to a hearing, and after issues closed, on the sole ground that its contents are not germane to the subject-matter of the original bill, we submit that in this cause the subject-matter of the cross-bill is "closely allied, appropriate, fitting and relevant" to the subject-matter of the original bill.

The original bill sets out the execution of the bonds and trust deed, their validity, *the indebtedness of the company to the bondholders*, that the same is due and unpaid.

The cross-bill sets out that, *in and by the same transaction* in which the indebtedness of the company on the bonds was created, the indebtedness of each bondholder on his stock subscription was created; that if the indebtedness of the company on the bonds is valid, the indebtedness of each bondholder on his stock subscription is valid; that if the indebtedness on the bonds is due and unpaid, so is the indebtedness on the stock subscription; that your petitioners, the cross-

complainants, became stockholders at the same time with the bondholders, and by virtue of the same mutual agreement set out in the option-contracts to organize the company; that they had no knowledge of, nor have they ratified or acquiesced in the action of the bondholders in taking their $2,113,000 of stock without any payment therefor. The cross-bill asks for an accounting as to each bondholder, who is the real party in interest, although represented by the mortgage trustees, and that the respondent, Columbia Straw Paper Company, shall have the affirmative relief of a decree against each bondholder for such amount as shall be found due over and above the amount due on each bond. The debts are shown to be mutual, and to grow out of the same transaction. It is a pure specimen of equitable set-off, which should be allowed.

That your petitioners can obtain such relief in this foreclosure suit seems clear, under

Equity Rule 94.

Bayless vs. Ry. Co., 8 Bissell, p. 193.

Thomas vs. R. R. Co., 101 U. S., p. 71,

Thomas, Trustee, vs. Ry. Co., 109 U. S., p. 552.

Morawetz on Corp., Section 306. Citing authorities.

VI.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE DID NOT SUPPORT THE CONTENTION OF THE PETITIONERS THAT THERE IS A LIABILTY, ENFORCIBLE IN THIS CAUSE, AGAINST THE BONDHOLDERS HOLDING STOCK THAT IS NOT PAID FOR TO THE COLUMBIA STRAW PAPER COMPANY, AMOUNTING TO $2,113,000, AND WHICH INDEBTEDNESS SHOULD BE SET OFF AGAINST THE INDEBTEDNESS ON EACH BOND.

The Circuit Court held (Rec., p. 525): "There is no "basis in this case for any ruling that the holders of "the stock referred to, sustain the relation of debtor to the "Columbia Straw Paper Company for the price of that "stock."

"This is not a case where a stock liability was incurred "by certain persons, and afterwards (the liability) gotten "rid of in some way without payment."

"The Columbia Straw Paper Company parted with its "capital stock for what was agreed to be the value of that "stock."

The Circuit Court of Appeals say (Rec., p. 575): "*The* "*main question* is whether there is any liability on "the part of the stockholders in defendant company which "can be enforced in this proceeding, or set up as a reason "for defeating the foreclosure. We are of opinion that these "contentions made by the defendants were properly over-"ruled. The prime difficulty was in the lack of evidence to "support the allegations of the answer. There was no "evidence of any fraudulent overvaluation, or of issuing "stock without consideration."

The Circuit Court of Appeals say (R., 575-576), "that the "holders of options and the new company, *in the "absence of fraud*, could set such valuation "on the plants as they chose; that the "owners of mills 'wanted more capital;' that the "company issued these bonds upon a full consideration of "the benefits to be derived to the stockholders by such a "proceeding; that minority stockholders who 'knew all "about the proceedings,' cannot complain; that possibly "Stein received more than he was entitled to, but that this "point was a matter of opinion; that there was no fraud or "collusion, as alleged in the answer; that the petitioners "went into the enterprise with their eyes wide open; that "there was no concealment or misrepresentation."

Then follows the statement on page 576, remarkable in view of the foregoing quotations, that "*the terms of the op-"tions, the value of the different properties, the conditions of "payment, and all other material facts were accessible to the "company*, and to each stockholder."

The opinion then on page 576 admits that if this were a case of a creditor against a stockholder in which a gross overvaluation was shown, a different rule would prevail.

We submit that the evidence establishes that each bondholder is a debtor to the company for the shares of stock that he claims to have obtained through Stein; and that in law and equity he is liable to the Columbia Straw Paper Company for its par value.

The option contract (Rec., pp. 503 to 508) contains the *only* agreements between the petitioners and other mill owners on one hand and Beard and Ramsdell and their

assignee, Emanuel Stein, on the other. There is no dispute on this point. *The contention between the petitioners and respondents is as to the construction of the meaning of these option contracts.*

The petitioners contend that they mean that the Columbia Straw Paper Company should have the right to receive a transfer of the options direct from Beard and Ramsdell, "their nominees or assigns," in order to accept them at prices named; or else, if accepted by them, to receive a transfer of the properties at prices named in the option. In other words, that the Columbia Straw Paper Company was intended by all the parties to the option contract to be the real purchaser of the absolute title to the mill properties at the aggregate of the option prices, either directly or indirectly; and should pay stock directly to the mill owners as part of the purchase price, and should issue bonds directly to the subscribers for bonds.

The contention of the respondent trustees is, that the meaning of the option contract is, that Beard and Ramsdell, "their nominees or assigns," (and hence Stein) having got the options, and accepted them, could in turn sell these very properties to the very corporation organized under the option contracts, at any price above the aggregate amount of the options, however large, that a compliant board of directors of such corporation might be induced or instructed to value such properties.

In deciding between these two contentions, no ambiguity will be found in the option contracts. If any there were, the positive sworn statement of Ramsdell himself, on page

207 of the Record, would remove such ambiguity. He says that it was always understood and agreed by him "*that the said options should be at once* turned over to the corporation itself." Mr. Ramsdell is as capable as Stein. Wolf, Untermyer or Beard to explain the meaning of these agreements, and he is perfectly disinterested as between the petitioners and respondents.

Sherwood, who assisted in taking the options, at page 343 testified: "I never saw that proposition, the proposition "of Stein to sell 39 mills to the company for the $5,000,000 "of stocks and bonds, and I never knew a thing of its be-"ing made until I found it in the bill along about the 1st day "of February of this year" (1895.)

Stein and Wolf both testify in this case. They are both charged in the answer of petitioners with being parties to the frauds therein alleged and for that reason each of them may "well be regarded, therefore, as an adverse witness, "whom the party, *by the exigencies of his case*, was obliged "to call." This quotation is the language of Hon. Rufus W. Peckham in deciding the case in the New York Court of Appeals of *Becker vs. Koch*, 104 N. Y., p. 394, and in that case the law of evidence (fully quoted in 15th Edition of Greenleaf in Note to Section 442) in such cases is laid down as follows: "Whatever favorable facts the party "calling him obtained from such a witness, may be justly "regarded as wrung from a reluctant and unwilling man; "while those which are unfavorable may be treated by the "jury with just that degree of belief which they may think "is deserved, considering their nature, and the other cir-"cumstances of the case."

Again, "In such a case as that there is no deception. "*The defendant calls the very man he accuses of the fraud as "a witness to prove it.*"

We ask the court to judge all the testimony of Stein and Wolf on all matters connected with the answer; and of Huertly as to the Flanagan judgment and the declaration of principal due; by this rule of evidence.

Stein, therefore, as the assignee of Beard and Ramsdell, held these option contracts under their terms for and on behalf of the Columbia Straw Paper Company and those agreeing in the options to become stockholders when it should be organized. He accepted them on October 31, 1892, and the company was organized on December 6, 1892. He became a trustee for the company, and these petitioners and others, and upon its organization an *honest* board of directors would have required from him either an assignment of the options themselves, or a deed to the company of all his interest in the deeds to him from the mill owners executed to carry out their agreements; and would have taken over the mills direct, issuing stock direct to the mill owners, and issuing bonds to the subscribers upon their paying to the company the moneys therefor. These bonds under paragraph 5 of the option contract (p. 505) would have been drawn "*to run not less than ten years*," and have contained such other provisions as an *honest* board of directors could have honestly approved on behalf of the company. There would not have been provisions for an enforced payment of ten per cent. premium every year.

There is no dispute in the evidence that Beard, Untermyer, Wolf and Stein and their associates got into their

possession and have enjoyed the beneficial ownership of all the surplus stock of $2,113,000, being the $4,000,000 of capital stock less the $1,887,000 paid to the mills. Both petitioners and respondents agree that this $2,113,000 was obtained by Stein offering to sell the properties embraced in the options to the company for $5,000,000 payable $1,000,000 in bonds and $4,000,000 in stock, and the acceptance of the same by the company. There is no dispute as to the plan by which the bonds and stock, provided in the options, were issued and distributed as far as mere *form* is concerned. (Stein's testimony, Rec., 316 to 334; Wolf's testimony, Rec., 441 to 475.)

The *main question* (to use the words of the Circuit Court of Appeals) now before the court, is whether this plan that was pursued was a *valid sale* so far as these petitioners and the company are concerned. It is a *main question* because under the common law, and under the Incoporating Act of New Jersey of 1875, stock cannot be issued unless its par value is paid for in money, or by property purchased at a valuation *not fraudulent*.

If this plan, although a sale under the New Jersey statutes *in form*, shall be shown to lack any of the essentials of a sale, then these stockholders must be held to be indebted to the company, on the ground that they are held to be implied subscribers by taking it. *Webster vs. Upton*, 91 U. S. p., 65.

In *Butler vs. Thompson*, 92 U. S. p., 412, this court declared the essentials of a valid sale, approving the definition of Mr. Benjamin in his work on sales; and further declared that no valid sale exists if any one of these essentials is lacking. These essentials are:

1. Parties competent to contract.

2. Mutual assent.

3. A thing, the absolute or general property in which is transferred from from the seller to the buyer.

4. A price in money paid or promised.

Now, Stein had no "absolute or general property" in the mills transferred,—the "thing,"—nor even the right to acquire the same under the options. He, the alleged vendor, on the one hand, and the "dummy" board of directors, the alleged vendees on the other, both knew this, for Stein's title in the mill properties grew out of and was measured by the options, because he and his assignors, Beard and Ramsdell, could get whatever title they had only from the mill owners. All the title that these options gave to "Beard and Ramsdell, their nominees or assigns" at most was the right to accept the options, and then have title made to them for no other purpose than of "subsequently transferring such properties to the corporation to be organized, "pursuant to the terms of this agreement." (Paragraph eighth, Rec., p. 506.) Under the options then the absolute title under the option contract was to remain in the mill owners until payment was made to them by the corporation and *no one else*; and afterwards upon payment, was to vest in the corporation. (Rec., Recital 2, p. 503, paragraphs eighth, ninth and tenth, p. 506.) The fact that the mill owners did execute deeds to him as grantee, which deeds were placed in the hands of the Northern Trust Company long prior to the payment therefor by the company, in no sense gave Stein the absolute title. Such procedure was in direct conformity with paragraphs third, eighth and tenth of the option.

What was done by Stein, Untermyer, Beard and the

"dummy" board of directors afterwards in reference to the proposition of sale; acceptance of such proposition; making of the contract; making of the modification of the contract, all of which is fully set forth in the record at the pages above cited, in no way affected the absolute title that the mill owners had prior to the giving of the options, nor could it in any way affect their agreements in the options themselves; because the evidence shows conclusively that all these proceedings were had absolutely without any knowledge, consent, assent, acquiescence or ratification on the part of these petitioners and the other mill owners; and as the record shows, not one of them knew anything about any of these irregular proceedings in violation of their rights under the options until after the bill was filed on January 22, 1895 (Rec., p. 343), and they were informed in April, 1895 (Rec., pp. 375-376), when they decided upon protecting this company and themselves against the unwarranted proceedings of Stein and the "dummy" board of directors.

Therefore we say one essential element was lacking in this sale.

Another essential element is that there must be "mutual assent." This essential means that the petitioners and the other mill owners on one part and Stein and the board of directors on the other should mutually assent to what was the thing to be sold and what was the price to be paid; and as the petitioners and mill owners were to become stockholders, to the mode of organization if to be different from provision of the options. The options show that the mill owners were selling to the *company only* the absolute title to their mills at an agreed price, and in consideration of their

mills being bought by the company at the price of the options they were to take stock in the new company on the basis of all seventy mills being in. This fact is shown by not only the options, but by Stein's testimony, on page 315 of the Record, that a certain number of tons should be secured, and Mr. Samuel Untermyer, in his answer to the cross-bill (Rec., p. 182), shows that this number of tons was to be at least 97 per cent. of the entire production of the country; and every member of the firm of Dupee, Judah, Willard & Wolf, in their answer under oath to the cross-bill (commencing at bottom of page 139 and on page 140), set up that the "daily productive capacity of the mills purchased, or to be "purchased, was about 339 tons." and the yearly consumption was 90,000 tons. As there are about 300 working days to a year, it is a matter of easy calculation that the members of the firm of Dupee, Judah, Willard & Wolf were of the same opinion as Untermyer and Stein, that all seventy mills were to be purchased; and this fact is established beyond question by the testimony of Sherwood heretofore set out on pp. 22, 23, 24 and found in the Record, pp. 339 to 341, 345, 346, 358, 368, 369, 370, 371 and 372. Consequently, we say that the assent of the mill owners, as disclosed by the options and the sworn testimony of Stein, Untermyer, Dupee, Judah, Willard, Wolf and Sherwood, was that they were selling the absolute title of their mills direct to the corporation to be organized and to *no one else* and taking back stock in part payment of the purchase money in the corporation on the basis that at least 97 per cent. of the entire productive capacity of the mills were to be in the corporation and which makes the full seventy mills, as three of them were in process of construction.

The assent of the company as disclosed by the proposition of Stein, resolutions of the stockholders and the board of directors and the contract made by the company with Stein, showed that the assent was to purchase the absolute title to only thirty-nine of these mills, and to purchase it from Stein and not from the mill owners. The fact is that there was no assent at all on the part of the corporation because the evidence shows that the board of directors was a "dummy" board of directors, all of whom were promoters, willing instruments and in the active interest and under the complete control of Untermeyer and Beard.

We therefore say that a second essential element is lacking, and consequently it was not a valid sale as between Stein and the company.

A third essential was a price to be agreed upon, and which is lacking. No one can claim that under the evidence the mill owners by their agreements in the options agreed that these thirty-nine properties should go to the corporation for $5,000,000. Nor can it be claimed that Stein or the board of directors so understood the options.

What Became the Position of Stein and Those He Represented, There Being No Valid Sale?

The transaction between Stein and the Board of Directors, therefore, construed by the rule laid down in *Butler vs. Thompson, supra*, is clearly not a *valid sale* so far as the $2,113,000 of stock obtained by the bondholders is concerned. However it is equity that Stein and the men whom he represented, (that

is the bondholders,) shall be held to carry out the agreements they made with the company in the options and with these petitioners, and the sale of the properties to the company shall be held valid so far as the $1,887,000 of stock is concerned and which the mill owners got.

Thompson on Corp., Sec. 462, Vol. I., and many English chancery cases cited in footnote.

Consequently the transaction between Stein and the Board being upheld as a *valid sale* so far as the $1,887.000 of stock received by these petitioners and other mill owners are concerned; the enquiry now presents itself as to the relation that Stein, Untermyer, Beard, Wolf and their associates hold to the Columbia Straw Paper Company as holders of both bonds and shares of capital stock.

It is certain that Stein and the bondholders could not, under the above circumstances, take these options on the mills for the purpose of organizing a corporation, and then organize a company to buy them at a price beyond that named in the option contract, and take without consideration all such profits, for the reason that the position of Stein, Untermyer and their associates in this case with reference to the company, petitioners and mill owners, is very similar to the position of the promoters to the subscribers to stock in the case of *Brewster vs. Hatch*, 122 N. Y., p. 349, because of the fact that all that Stein had was options on the mills when he made his propositions to the Board of Directors, who knew all the circumstances. In fact Stein held the options only in trust for the petitioners, whereas the promoters in the Brewster

case held them absolutely as against the complaining subscribers to stock in that case.

In *Brewster vs. Hatch* the subscribers sued the promoters for damages. Our case is stronger in that the petitioners are here asking on behalf of the company that the promoters, the bondholders, shall pay into the treasury of the company the par value of the stock ($2,113,000) that they have appropriated and have had the benefit of in order to give the company an opportunity to pay the $1,000,000 that they claim the company owes them on the bonds and for, and by means of, which they desire practically to take all the company's property.

In so far as concerns these petitioners and the Company represented by them, these bondholders do not hold this $2,113,000 as a *gift* because *the mortgagor-corporation could not give away its stock as against non-assenting stockholders, any more than as against creditors.*

Cook on Corporations (4th Ed.), Sec. 41.
Morawetz on Priv. Corp., Secs. 270, 286, 288.

At Sec. 286 Mr. Morawetz tersely states the rule:

> "Every shareholder in a corporation is entitled to insist that every other shareholder shall contribute his ratable part of the company's capital for the common benefit." * * * "It would be a plain violation of the equitable rights of those shareholders who have contributed the amount of their shares in full, to allow any persons to have the benefits of membership, without adding the amounts of their shares to the company's capital."

In the case of *Clark vs. Bever*, 139 U. S. 96, this court held that as between consenting stockholders an original

issue of stock might be issued for less than its par value under the statutes of Iowa. But the court limited the rule by stating (p. 113), that they were not liable "unless it ap- "pears that they acquired the stock under circumstances "that do not give creditors *and other stockholders* jus "ground for complaint."

What Does the Transaction Whereby Stein and His Prin cipals Acquired the 21,130 Shares of Stock Amount To?

The transaction between Stein, Untermyer and their associates and these petitioners is very similar to the facts presented in the case of *Morrow vs. Iron & Steel Co.*, 87 Tenn., p. 262. It amounted to this: They substantially subscribed for $2,113,000 of stock, and instead of paying therefor, secured an agreement from the company, that they would, for $1,000,000 advanced, be given fully paid up stock to the amount of $2,113,000, and a lien or mortgage on the plant of the corporation, whereby it was to pay back the money they advanced.

On page 272 Judge Lurton in *Morrow vs. Iron & Steel Co., supra*, says:

> "Is a contract by which a corporation agrees to repay to the contributors of its capital stock their several contributions, and whereby such contributions are converted into corporate debts, valid even as against the corporation? Upon what consideration does such an agreement rest? *and what power has a corporation to bind itself by such a contract?*"

The mere suggestion that the effect of the scheme in the formation of the Columbia Straw Paper Company and the pretended sale by Stein to the corpora-

tion, is to make Stein, Untermyer and their associates, who gave nothing for their stock, *secured creditors*, while these petitioners who gave their mills for stock and have paid for it in full, are but *general or deferred creditors*, conclusively proves its invalidity as far as these petitioners are concerned. Such a scheme throws all the risks and hazards of the business on these petitioners without their knowledge or consent; while Stein, Untermyer and their associates would reap, without payment therefor, all possible gains and would be secured against loss in the event that the enterprise should prove unprofitable.

The scheme by which Stein, Untermyer and their associates got this $2,113,000 of stock without payment therefor except the $1,000,000 they claim to have paid for the bonds, is condemned by what this court said in *Sawyer vs. Hoag*, 17 Wall., p. 610:

> "It must be treated as an agreement between the corporation, by its officers, on the one hand, and the appellant (here bondholder) as a subscriber to the stock of the company on the other hand, to convert the debt which the latter owed to the company for his stock, into a debt for the loan of money, thereby extinguishing the stock debt."

To same effect is *Camden vs. Stuart*, 144 U. S., at page 114.

In *McCormick vs. Market Bank*, 165 U. S., p. 538, at page 550, this court say:

"When the corporation is created by a charter granted "by the legislature any person dealing with it is bound to "take notice of the forms of the charter and of the general "laws restricting the rights or defining the powers of the "corporation. (Citing authorities):

Sections 54 and 55 of an act concerning corporations approved April 7, 1875, of the State of New Jersey, and found in New Jersey, Revised Statutes 1875, Supplementary p. 20, in force at the time the Columbia Straw Paper Company was incorporated, are as follows:

> "54. Nothing but money shall be considered as payment of any part of the capital stock of any company organized under this act, except as hereinafter provided for the purchase of property; and no loan of money shall be made to a stockholder or officer therein; and if any such loan shall be made to a stockholder or officer of the company the officers who shall make it, or who shall assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the company contracted before the repayment of the sum so loaned.
>
> "55. The directors of any company incorporated under this act may purchase mines, manufactories, or other property necessary for their business, and issue stock *to the amount of the value thereof in payment* therefor, and the stock so issued shall be declared and taken to be full paid stock, and not liable to any further call, neither shall the holder thereof be liable for any further payments under any of the provisions of this act, and said stock shall have legibly stamped upon the face thereof the words, 'issued for property purchased'; in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

Consequently these bondholders must be held to be bound to pay the par value of this stock under section 54, because there was *no valid* sale as far as this $2,113,000 of stock is concerned for property under said section 55.

But this is the rule at common law as well as under the New Jersey Statutes. As promoters they were trustees for the company, and in equity are held to intend the necessary consequences of their acts in taking the stock, and that is to pay what that stock is worth. This value as an original issue is the par value. The Circuit Court of Appeals was in error in thinking of any lower value.

Thompson on Corporations. Vol. 1, Secs. 456, 457, 458 and authorities.

It is not necessary in order to make anyone a subscriber to capital stock that he formally subscribe on the books of the Company. The issuance of the stock to him without any consideration and his acceptance of the same are sufficient to make the holder of that stock a stockholder.

In *Upton, assignee, vs. Tribilcock*, 91 U. S., p. 44, on page 47, the Supreme Court say:

> "The acceptance and holding of a certificate of shares in a corporation makes the holder liable to the responsibilities of a shareholder."

Morawetz on Corporations, Sec. 303.

Sanger vs. Upton, assignee, 91 U. S., 56, p. 60.

In *Lloyd vs. Preston*, 146 U. S., p. 630, affirming 36 Fed., 54, this Court held, that although it was true that the stock had been issued by the company in payment for the properties, yet the circumstances of the case were such as to show the sale was fraudulent as well as the overvaluation of property; that having taken the stock, Harper was liable for its *par value:* and that, as the evidence showed, the complainants had no

knowledge, they were not estopped from suing Harper on his *implied subscription* growing out of accepting and taking the stock under the form of a sale at an overvaluation.

This case presents all the questions arising out of the pretended sale by Stein to the company; there was the same "dummy" board of directors, under the complete control of Harper, pretending to buy property on behalf of the company at the price fixed by Harper, and issuing to him certificates of stock marked full paid and non-assessable as in this case.

Therefore as these bondholders are liable each to the Company as a holder of original stock, for the payment of the same; the amount to be paid is the *par value* of the same, and not the market value as thought by the Courts below.

In re Heppenheimer, 56 N. J. Eq., 240, (36 Atl. Rep., p. 966,) which grew out of this pretended sale by Stein to the Columbia Straw Paper Company, the chancellor held that a bill is good filed by the receiver against Heppenheimer, Untermyer and others as promoters of the Columbia Straw Paper Company, asking that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that those bondholders accepting stock shall be held liable for such part of the par value as was not fairly paid for by the property.

SET-OFF.

We now have the Company indebted to each of these bondholders, represented by the respondents, for the million dollars, the amount of the bonds; and we also have these same identical bondholders, under the evidence, each

indebted to the Company for the *par value* of the capital stock that he holds as an original taken and implied subscriber aggregating $2,113,000. Therefore under the decisions and equitable principles it seems the indebtedness set up in this suit ought to be set off one against the other under the averments of the answer of the petitioners; and had the Circuit Court not struck the cross-bill from the files, a decree should have been rendered against each bondholder for any balance he might owe on his stock over and above the amount due him on his bonds. In this case this affirmative relief would have amounted to over $1,000,000 after paying the bonds in full.

Set-off is enforceable in equity where there are mutual debts and mutual credits, or where there exists some equitable consideration or agreement between the parties which would render it unjust not to allow set-off.

Gray vs. Rollo, 18 Wall., p. 629.

Wanzer vs. Truly, 17 Howard, p. 584.

Story's Eq. Juris., Secs. 1430 to 1445, (13th Ed.)

In this case the trustees represent a million dollars of bonds. The answer alleges, and the evidence establishes, that the holders of these bonds are indebted to the defendant company in $2,113,000 for their unpaid subscriptions to the capital stock. If these are not mutual debts and credits which off-set each other, it is difficult to understand what are.

In the case of *Patterson vs. Linde*, 106 U. S., p. 519, on page 521, this court say:

> "The liability of the stockholder to the creditor is through the corporation, not direct.

In the suit at bar, which was brought before *In re Heppenheimer*, *supra*, the corporation is a party. The Master finds there are no other creditors than the bondholders who are represented by their trustees; all the assets of the company are embraced in the mortgage. The evidence is conclusive that the only parties who have not paid for their stock in fact are the parties who hold the bonds. It is competent, therefore, for this Court—all necessary parties being before it,—to require these unpaid subscriptions to be paid into court, make a fund to pay the bonds, and in default thereof to declare the bonds invalid.

The courts of New Jersey have alrendy declared equitable set-off to be the proper remedy in the case of *Hebberd vs. Southwestern, etc., Co.*, 56 N. J. Eq., 18; 36 (Atl. Rep., p. 122 (N. J.),) where bonds with a bonus of stock having been issued, the court held that as against the parties receiving the bonds, the liability on the stock could be off-set against the amount due on the bonds.

In *Goodwin vs. Keney*, 46 Conn., p. 563, which was a suit for foreclosure of mortgage against the owner of the equity of redemption, defendant for defense set up a demand she had against complainant, who was alleged to be insolvent. The court allowed the set-off, and complainant appealed.

The court on appeal say:

> "We think the set-off properly allowed. Courts of equity in matters of set-off usually follow the law, but in many cases, where there is some intervening equity, they will allow a set-off, where a court of law would not. Is there such an equity in this case? It is a maxim of equity, and one of pretty general application, that he who seeks equity must himself do equity.

> *This maxim is applicable more especially to the party who applies to the court for relief.* The petitioner (complainant) by thus applying has exposed himself to the full force of the maxim. By resisting the set-off he virtually says, 'Aid me in collecting my debt, and help me to resist the payment of a debt which I honestly owe.' This the court cannot consistently do."

"*Circuitus est evitandus*" is a rule always favored in equity, and to prevent circuity of action, a court of equity often entertains jurisdiction *upon this ground alone;* and *to avoid it*, cross demands are allowed to be set-off against each other.

It is also another maxim, that, "he who seeks equity must do equity."

In the case at bar, the bondholders are before the court by their trustees, the respondents, and should be made by this court to do equity when seeking its aid in the collection of their alleged debts.

When the courts of this land shall strike through and brush aside all the forms and subterfuges by which original issue of stock is gotten out of the treasury of a corporation, and declare that the organizers or promoters must pay in money the par value of the stock they have obtained *by means of the form of a sale at a fraudulent valuation*, then will cease the organization of large corporations with large issues of "watered" stock. The courts will do that which both the States and the federal government by enactment of laws, have been as yet unable to do. Every corporation of small or large capital will then have in its treasury a dollar in money for every dollar in stock that is issued. Then legal treatises on cor-

porations will not state that the investing public expect to be deceived as to the values of the shares of stock in which they attempt to make permanent investments.

Cook on Corporations, Section 46, page 118, Vol. 1 (4th Ed.) says:

> "There is no more harm in the issue of stock below par than there is in the issue of a note or bond below par. The extent to which the courts have gone in sustaining such issues of stock for property is shown by the fact that even constitutional and statutory prohibitions against 'watered' stock have been practically construed away by the courts. Moreover, the laws of trade are more powerful than the laws of men, and in business circles it has become customary to capitalize property at a reasonably high figure. This is due to the fact that it is easier to sell stock at less than par than at par and also to the fact that, by a large capitalization, *dividends are kept low enough to avoid the cupidity of possible competitors and the interference of legislatures.*"

The latest declarations of this court do not seem to be in accord with the doctrine just quoted from Cook. In the case of *Smyth vs. Ames*, 169 U. S., p. 466, on page 546, this court say:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute,

and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. *What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to, demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.*"

It is true that this was said as applied to a common carrier, but why should not it apply equally to an industrial organization? If a railroad company should not be entitled to secure a return on capital not invested by means of watered stock, does not public policy require that such an industrial organization should be limited to a fair return on the capital invested.

Any method that will tend to limit the capitalization of the great industrial combines of the present to an amount equal to the actual capital paid into the treasury and the fair cash value of the property taken over, we submit, should receive the sanction of the courts; one of the surest methods to attain this end is to compel the original takers to pay for their stock in full, at its par value, If the promoters realize that the corporation must have an actual capital equal to the face of its stocks and bonds, there will not be the over-capitalization of to-day. The consumer will not be robbed, and labor will not receive one reward while capital is being paid two or three times over.

Conceding for the sake of the argument, although we

do not admit it, that the bondholders here should not be compelled to pay for the stock which they say went as a *bonus* with the bonds, namely, $600,000, nor for the $333,000 which was placed in the hands of Wolf as trustee on the order of the organizers of the corporation, and then make an allowance for service in the organization of the corporation on the basis which it is claimed was made to Sherwood for his services, namely, $25,000; it still appears that the bondholders in this case are the holders of over a million dollars of the capital stock of the Columbia Straw Paper Company, which they took from its treasury without paying a dollar therefor.

But our contention is that the bondholders owe the corporation $2,113,000.

We very respectfully submit that the decrees of the Circuit Court and the Circuit Court of Appeals should be reversed, and the cause remanded, with instructions to re-instate the cross-bill; and upon application of appellants, to refer the issues made by the cross-bill and answers to the Master, and at such hearing an accounting be had on the respective indebtedness of each bondholder to and from the Company by reason of stock and bonds, and that the one indebtedness be off-set against the other, and that a decree be rendered for the payment of the balance; and for such other and further decrees as this court may direct; and for such further proceedings as may be found necessary to do full and complete equity by this court.

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